

# HOW A BROKEN PROCESS LEADS TO FLAWED REGULATIONS

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## HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

SEPTEMBER 14, 2011

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## HOW A BROKEN PROCESS LEADS TO FLAWED REGULATIONS

WEDNESDAY, SEPTEMBER 14, 2011

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:33 a.m., in room 2154, Rayburn House Office Building, Hon. Darrell E. Issa (chairman of the committee) presiding.

Present: Representatives Issa, Mica, McHenry, Jordan, Chaffetz, Walberg, Lankford, Amash, Labrador, DesJarlais, Gowdy, Guinta, Farenthold, Kelly, Cummings, Maloney, Norton, Tierney, Cooper, Connolly, Quigley, Davis, Welch, and Murphy.

Staff present: Michael R. Bebeau, assistant clerk; Robert Borden, general counsel; Molly Boyl, parliamentarian; Lawrence J. Brady, staff director; Joseph A. Brazauskas and David Brewer, counsels; John Cuaderes, deputy staff director; Gwen D. Luzansky, assistant clerk; Adam P. Fromm, director of Member liaison and floor operations; Linda Good, chief clerk; Ryan M. Hambleton and Kristin L. Nelson, professional staff members; Christopher Hixon, deputy chief counsel, oversight; Justin LoFranco, press assistant; Mark D. Marin, senior professional staff member; Kristina M. Moore, senior counsel; Laura L. Rush, deputy chief clerk; Rebecca Watkins, press secretary; Peter Warren, legislative policy director; Krista Boyd, minority counsel; Ashley Etienne, minority director of communications; Devon Hill, minority staff assistant; Carla Hultberg, minority chief clerk; Paul Kincaid, minority press secretary; Chris Knauer, minority senior investigator; Lucinda Lessley, minority policy director; Dave Rapallo, minority staff director; and Suzanne Sachsman Grooms, minority chief counsel.

Chairman ISSA. Ladies and gentlemen, in the interest of time, we are assured the witness is coming, but we are going to go ahead and begin, and he will be sworn in separately if he arrives after that.

The hearing will come to order.

The Oversight and Government Reform Committee exists to secure two fundamental principles: first, Americans have a right to know that the money Washington takes from them is well spent and, second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers, because taxpayers have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to de-

liver the facts to the American people and bring genuine reform to the Federal bureaucracy.

Good morning again. Our hearing today is going to scrutinize agencies and the Federal regulatory process. We not only know on this committee that it is flawed and that it often punishes job creators and stifles economic growth, but President Obama has spoken about and even launched an effort to evaluate regulations that create unnecessary burdens. Regulatory agencies under this administration, though, have gone in the opposite direction.

And understand regulatory agencies under every administration have a push to do more. But under this administration we have increased from 2,044 in 2009 to 2,439 in 2010. Another way of putting it is they pass more laws than we do here in Congress. Their laws are not subject to accounting in the way that we are. If we cost more money, we have to find offsets. Regulatory agencies have an inherent right to pass on cost to you.

We have seen the budgets of these regulatory agencies grow by 16 percent over the last 3 years. Investor's Business Daily summarized: If the Federal Government's regulatory operation were a business, it would be the fiftieth largest in this country in terms of revenue and the third largest in terms of employees. Regulators in America represent a larger work force than all of McDonald's workers, Ford's workers, Disney's and Boeing's combined. With a quarter of a million regulators, there is no question that job security is, in fact, growing their operation.

Employment at regulatory agencies has climbed 13 percent since President Obama took office, and the number of staff working on regulatory matters is scheduled to increase at a rate of 10,000 new employees per year over the next 2 years. The number of full-time regulators now is expected to reach, in 2012, 291,000.

Meanwhile, since President Obama took office, private sector jobs have declined by 5.6 percent. We don't blame the President for the growth of regulation; we don't blame the President for the loss of jobs. But under his watch this has occurred. Under our watch, Mr. Cummings and myself, we have an obligation, with the President, to reverse this trend.

The administration has 219 economically significant regulations in the pipeline right now. If finalized, these would cost \$100 million or more each year to the economy. That is a minimum cost of \$219 billion over 10 years. And understand when I said that, each of them is significant; therefore, each of them costs more than \$100 million apiece.

To date, the administration has already imposed 75 new regulations, at a cost of more than \$380 billion over 10 years. The business owners and workers who we will hear from today are not Fortune 500 executives, they are Main Street business owners and workers from around the country. They, their families, coworkers, and employees bear the cost of new and proposed regulations. For them, the business around the country has a price greater than just compliance; it is in fact a hidden tax, uncertainty, and perhaps the loss of jobs not yet created or jobs that will not be retained.

An uncertain regulatory climate breeds a market of uncertainty, forcing job creators' capital to wait on the sidelines. Making matters worse, the Federal agencies charged with serving as a watch-

dog over Federal rulemaking, OIRA, has failed to take meaningful action to address the breakdown in this process.

One of our questions today will be if an agency says something is not economically significant, meaning less than \$100 million, and later that is proven to be flawed, is there going to be a do-over or do we simply assume that we didn't catch that one and it becomes law without the scrutiny of its economic impact?

Today we will hear from Administrator Sunstein and expect him to address specific details of why and how this has happened and what we can do to fix it. I would like to take note that the written testimony he will provide to the committee fails to answer the questions that we have asked. I intend to ask Mr. Sunstein to explain how the regulatory process can be circumvented, ignored, or openly flaunted by the bureaucracy in a manner contrary to direction given by the President.

Thus far, the rhetoric we have seen from the Obama administration on the issue of regulatory reform has not matched its deeds. But we take the President at his words. We intend to assist in seeing that, under our watch and under the President's watch, we reverse this trend.

In order to be fair to the ranking member, I will put the rest of my opening statement in at this time, and I recognize the ranking member for his opening statement.

[The prepared statement of Chairman Darrell E. Issa follows:]

**How the Administrative State has broken Obama's Promise of Regulatory Reform**  
**House Oversight and Government Reform Committee**  
**Chairman Issa**  
**September 13, 2011**

- Good morning, today's hearing will scrutinize government agencies and the federal regulatory process.
- It is a flawed and broken system that punishes job creators and stifles economic growth.
- While President Obama has spoken about, and even launched an effort to evaluate regulations that create unnecessary burdens, regulatory agencies under his administration have gone the opposite direction.
  - The number of proposed rules have increased from 2,044 in 2009 to 2,439 in 2010.
  - Regulatory agencies have seen their budgets grow by 16 percent over the past three years. As *Investor's Business Daily* summarized, "[i]f the federal government's regulatory operation were a business, it would be one of the 50 biggest in the country in terms of revenues, and the third-largest in terms of employees, with more people working for it than McDonald's, Ford, Disney and Boeing combined."
  - Employment at regulatory agencies has climbed 13 percent since President Obama took office, and the number of staff working on regulatory matters is on schedule to increase at a rate of 10,000 new employees per year in 2011 and 2012.
  - The number of full time regulatory employees is expected to reach an all-time high of 291,676 in 2012.
  - Meanwhile, since President Obama took office, private sector jobs have declined by 5.6 percent.
- In some cases, the regulatory process has even been manipulated and exploited in ways that create desired outcomes for political allies of the Obama Administration.
- The Administration has 219 economically significant regulations in the pipeline right now. If finalized, they will impose costs of \$100 million or more each year on our economy. That is a minimum cost of \$219 billion over ten years.
- To date, the Administration has already imposed 75 new major regulations that will cost more than \$380 billion over ten years.
- The business owners and workers who we will hear from today are not fortune 500 executives, they are main street business owners and workers from around the country.
- They, their families, coworkers, and employees bear the cost of these new and proposed regulations.
- For them and businesses around the country, the price is greater than just compliance—there is the hidden tax of uncertainty.
- An uncertain regulatory climate breeds market uncertainty—forcing job-creating capital to wait on the sidelines.



- Making matters worse, the federal agency charged with serving as a watchdog over federal rulemaking—OIRA—has failed to take meaningful action to address the breakdown in the process.
- Today we will hear from Administrator Sunstein and expect him to address, in specific detail, how and why this has happened, and what can be done to fix this broken process.
- I would like to note that the written testimony he has provided the committee fails to address many of these issues.
- I intend to ask Mr. Sunstein to explain how the regulatory process can be circumvented, ignored or openly flouted by the bureaucracy in a manner contrary to the direction given by the President.
- Thus far, the rhetoric we have seen from the Obama Administration on the issue of regulatory reform has not been matched in deed.
- Today, the Committee is releasing a report that documents the size and scope of the broken rulemaking epidemic.
- Examples we document include:
  - EPA's sue-and-settle approach to bypass the process and avoid transparency on a recent lead paint rule with dire consequences for job creators;
  - Abuse of the emergency rulemaking process and use of "interim final rules" regarding Obamacare, causing health plans to lose grandfathered status;
  - An "enhanced review process" initiated by EPA of a Clean Water Act provision initiated in violation of the Administrative Procedures Act.
- These examples are but just a few of the countless regulations brought to our attention via AmericanJobCreators.com and committee investigations.
- The federal rulemaking process is indeed broken, and it is my hope that today's hearing will begin the process of shedding light on that broken system.
- We're here to give voice to job creators from around the country who have told us the only thing standing between them and new jobs or expansion is a little less red tape.
- With that, I would yield to the Ranking Member for the purpose of an opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman, and I thank you for calling this hearing. I think every member of our committee would agree that creating jobs should be our committee's number one priority. The question is whether we can develop bipartisan solutions we can all support.

When I go home to my district, only 40 miles away from here, my constituents tell me we need to find common ground; we need to focus on concrete proposals and we need to pass them now. More than 7 months ago, as one of my first actions as ranking member, I wrote to the chairman requesting that the committee hold hearings on an initiative proposed by President Obama in his State of the Union Address. The proposal was to create jobs and strengthen the economy by investing in America's infrastructure. This proposal was endorsed by both the U.S. Chamber of Commerce and the AFL-CIO.

As I said at the time, "These are exactly the kinds of bipartisan constructive initiatives our committee and Congress should support." When the chairman decided not to hold that hearing, I placed my statement into the record during a hearing just like this one, which focused on regulations. Since then we have held 20 more hearings on regulations, but we have held few hearings on bipartisan proposals to create jobs.

In his speech to Congress and to the Nation last week, President Obama renewed his call for bipartisan action on his infrastructure proposal to create jobs by rehabilitating homes, businesses and communities; investing in a national infrastructure bank; modernizing 35,000 schools; and expanding access to high speed wireless. As I said in a hearing yesterday, we have to be very careful in our country because if we do not improve our infrastructure, we will be destroyed from the inside.

On Friday I sent another letter to the chairman urging the committee hold hearings on the President's infrastructure proposal, as well as other components of the American Jobs Act. I hope this committee will hold these hearings and I hope we can be part of a helpful, positive solution.

With respect to regulations, I support a balanced and thorough review designed to improve regulations. I think there is no member of this committee that would be against that. One of the things that we must ask as we approach this is will we get rid of regulations and what guarantee that jobs will be created? Will we be in a situation where we have no regulations, businesses are making big money because they have gotten rid of regulations, benefits of the regulations are gone, companies are making all kinds of money and our poverty rate goes up, as was reported just yesterday, at an alarming rate?

As I have said before, I strongly believe that any responsible effort to review regulations must consider both costs and benefits. Today we will not hear a balanced view, by the way. Instead, we will hear a lopsided view about why some groups believe certain regulations are flawed. This approach narrows the information received by the committee and serves neither the regulatory process nor the public interest.

If a regulation is problematic, we should hear that. But to ignore the benefits only fuels cynicism about how we do business in this

Nation. On a broader level, repealing health and safety regulations is no silver bullet. With all due respect to our witnesses from the Association of Reptile Keepers, repealing a so-called job-killing regulation to allow more pythons, boa constrictors, and anacondas into the United States is not the kind of bold bipartisan solution Americans are looking for to help the economy.

I am also concerned that the committee may be expanding attacks on agencies charged with protecting American workers. This week a witness was added to the hearing at the last minute. Apparently, he is a plaintiff in an ongoing lawsuit against the National Mediation Board, who is objecting to rule changes under the Railway Labor Act. The District Court for the District of Columbia has already ruled against this plaintiff, but his case is scheduled to be appealed next week.

In my opinion, it is time to work together and take action on proposals we should all be able to support. That is what the American people want.

Mr. Chairman, with this in mind, I want to ask you if I can work together with you and with the other members of our committee to develop a joint, a joint bipartisan committee report with recommendations to the Super Committee on reducing the debt and increasing the jobs. As you know, the law was established that established the Super Committee gave our committee the option of submitting such a report by October the 14th. I think we would make a much more responsive contribution if we submit one together, with recommendations on which we all can agree. And I would ask, Mr. Chairman, if you would agree to do that. I think it is very important. I think we have a lot to contribute, particularly with the jurisdiction of our committee.

[The prepared statement of Hon. Elijah E. Cummings follows:]

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### Opening Statement

Rep. Elijah E. Cummings, Ranking Member

### Hearing on "How a Broken Process Leads to Flawed Regulations"

September 14, 2011

I think every Member of our Committee would agree that creating jobs should be our Committee's number one priority. The question is whether we can develop bipartisan solutions we can all support. When I go home to my district, my constituents tell me we need to find common ground, we need to focus on concrete proposals, and we need to pass them now.

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On a broader level, repealing health and safety regulations is no silver bullet. With all due respect to our witness from the Association of Reptile Keepers, repealing a so-called "job-killing" regulation to allow more pythons, boa constrictors, and anacondas into the United States is not the kind of bold, bipartisan solution Americans are looking for to help the economy.

I am also concerned that the Committee may be expanding its attacks on agencies charged with protecting American workers. This week, a witness was added to the hearing at the last minute. Apparently, he is a plaintiff in an ongoing lawsuit against the National Mediation Board who is objecting to rule changes under the Railway Labor Act. The District Court for the District of Columbia has already ruled against this plaintiff, but his case is scheduled for appeal next week.

In my opinion, it is time to work together and take action on proposals we should all be able to support.

Mr. Chairman, with this in mind, I want to ask if you and I can work together, and with other Members of the Committee, to develop a joint, bipartisan Committee report with recommendations to the Super Committee on reducing the debt and increasing jobs.

As you know, the law that established the Super Committee gave each Committee the option of submitting such a report by October 14. I think we could make a much more positive contribution if we submit one together with recommendations on which we all agree. Would you agree to consider this approach?

Chairman ISSA. I thank the gentleman and, in full answer to his question, I would certainly hope that we would submit joint suggestions and each of us, if necessary, submit separate suggestions. I think that all of our comments, both the majority, minority, and those which we can both agree on, should be submitted for the committee's approval, and I thank the gentleman for it.

With that, I would like to recognize the gentleman from Florida, the chairman of the Transportation Committee, Mr. Mica, for his opening statement.

Mr. MICA. Thank you, Mr. Chairman, and thank you, Mr. Cummings, for convening this important oversight hearing on regulations and its effect. I was thinking how do you get all these regulations. We are deluged with thousands of Federal regulations. Here is how we get them. It is great to follow Mr. Cummings, because he is on the Transportation Committee and talked about transportation.

This is the list of current surface transportation programs and bureaucracy. This is what we deal with on our committee and our jurisdiction. Look at them, dozens and dozens. It started from less than a dozen programs. Every one of these programs have to produce rules and regulations. So just look at this chart and then look at what these people have to do. So one of the first things you have to do is collapse some of the bureaucracy.

Some of these are duplicate activities and actually passing out all kinds of regulations that people have to deal with. Then the results are very important. And if you take something like Mr. Cummings talked about, transportation projects, what the President talked about, we can throw all the money we want at programs and try to say we are going to put people to work in transportation.

Here is the problem we face. Shovel-ready has become a national joke. This is why it has become a national joke. In this one chart here, you see it takes you about 6 years to comply with regulations to get any kind of transportation project that involves the Federal Government. Six years. So shovel-ready has become just a joke because you can't do it.

We have proposed actually to reduce the time, if you could do some approvals concurrently, rather than consecutively, so we are not accused of running over any environmental standards or regulations. And many of these things are important to comply with, but this is what you have to comply with now, all these rules and regulations to do a simple project.

So the rule of thumb is if the Federal Government gets involved, the project takes three times as long and costs three times as much. Then, if you are trying to shovel money into these projects, which we have tried to do, and we have the latest proposal for, what, \$450 billion, of which only 12 percent is transportation and infrastructure. You are going to run into the same problem they ran into lost time. How many times do you have to hit your head against the wall and get a different result?

But 35 percent of the \$63 billion, \$63 billion was the total out of \$787 billion that went for infrastructure, \$63 billion. Thirty-five percent, September 1st, was still in Washington, DC; they couldn't even spend it because of the regulations that inhibit the ability to move forward with a project. So we have to change both the scope

of the bureaucracies we have created and we have to reduce the regulations, or at least find some way to move forward in a coherent fashion if you want compliance, and people do want compliance with certain things, in a reasonable fashion, and that is what we are going to have to do.

But I am glad you brought up the subject, Mr. Cummings. And thank you, Mr. Issa, for holding this hearing.

Chairman ISSA. Would the gentleman yield?

Mr. MICA. Yes.

Chairman ISSA. We usually don't have additional opening statements, but I thank the gentleman because you came well prepared and because hopefully this committee, which represents the job impediments that every committee of Congress deals with, will benefit from that, and I want to especially thank you.

Mr. MICA. Well, thank you. And this is just a little microcosm, transportation. But you all serve on different committees and deal with different issues in your communities, and you see how we are strangling the Nation in bureaucracy and regulations, and we have to attack both and this is a good start. Thank you.

Chairman ISSA. I thank the gentleman.

We now recognize the gentleman from Illinois, Mr. Quigley, for his opening statement.

Mr. QUIGLEY. Thank you, Mr. Chairman. I appreciate the opportunity to speak.

I think the President had it right in the State of the Union Address when he talked about regulation and finding a middle ground. We can avoid unnecessary regulation; we can avoid duplicative regulation. It is a tough task, but it is important to do.

But I do think that there are mind-sets and there is legislation that is designed to eliminate any new regulation and to demonize it. So what I try to do is remind folks in this manner: try not to think about regulation at the Federal, State, or local level the next time you get on a commuter airliner. How much sleep has that pilot had? Try not to think about it if you are a miner in West Virginia, if you attend a State fair, you are a fisherman in the Gulf of Mexico, or if you come to my town, Chicago.

If you breathe in Chicago, we are the asthma morbidity and mortality capital of the United States, the next time we have an ozone alert. If you want to put it off, wait until lunch, when you have a turkey sandwich, or tomorrow morning when you have your eggs. About one in six Americans has food poisoning every year. A million cases of salmonella. Or if you just have a drink of water in Chicago, where chromium levels are three times the healthy limit and lead levels are surprisingly high, depending on where you are, based on the distribution system.

So I recognize that regulation isn't going to solve all our problems, but we have to constantly remind ourselves it shouldn't be just the day after a catastrophe that we say, well, we needed more government regulation. It is an even stream throughout our lives, recognizing that critical balance; not demonizing it, not cutting it off at the knees with lack of funding, but recognizing that middle balance that keeps us safe, keeps us healthy, because those catastrophes, those illnesses, those deaths cause us money, jobs, and it hurts the economy.

I thank you and I yield back.

Mr. CONNOLLY. Would the gentleman yield?

Mr. QUIGLEY. I yield.

Mr. CONNOLLY. I thank the gentleman. Mr. Chairman, if regulations and economical growth were inversely related, then sub-Saharan Africa would have the most productive economy on earth. If regulations and economic growth were inversely related, then economic growth would have accelerated during the Bush administration and shrunk during the Clinton administration. In fact, median household income today has declined to what it was in 1997. If an efficacious National Labor Relations Board actually impeded economic growth, then the 1950's and 1960's would not have produced the most sustained growth in middle class incomes in American history.

In reality, there is no empirical basis for the claim that government relation and economic growth are incompatible, or even inversely related. In fact, the evidence seems to suggest the contrary. Consider the automotive industry. For decades, the Big Three successfully resisted legislative efforts to establish meaningful fuel efficiency standards. Their success resisting legislation contributed directly to American automobiles losing market share to more efficient vehicles produced in Asia. Today, following a Federal rescue, General Motors and Chrysler automotive manufacturers are deploying more efficient, more competitive products consistent with Federal regulation.

Certainly, Mr. Mica has a point that we can find ourselves in a regulatory bind in which regulation goes amuck or becomes counterproductive. But the idea that somehow it is all or nothing is an unacceptable economic proposition. And as my colleague from Illinois just pointed out, from a human health point of view regulation is essential because the marketplace is not self-correcting.

Mr. Cummings made reference to the fact that we are now reduced, in this twenty-second hearing on regulation, propounding this etiology that regulation is strangling the American economy and if we only released it from regulation, jobs would flow and all would be well. We are now reduced to the point of actually hearing, no disrespect, Mr. Barker, about reptiles and how intrusive Federal regulation is in trying to protect the Everglades from now seeing pythons becoming an endemic species, killing off all kinds of flora and fauna that are native to the Everglades, and the fear that we have actually lost the battle because of lack of control, not because of too much control, of the importation of dangerous and foreign species into the United States.

So I look forward to the hearing, Mr. Chairman, but I certainly reject the premise. Thank you.

Chairman ISSA. I thank the gentleman.

All Members will have 7 days to submit additional opening statements and extraneous material for the record.

We now recognize our first panel of witnesses. Dr. John Graham is dean of the School of Public and Environmental Affairs at Indiana University. He served as the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget from 2001 to 2008, and at that time it was easier to



get through security here. You have our apologies for the trouble you had.

Mrs. Robbie LeValley is a co-owner of Homestead Meats, a direct meat marketing business that has been in operation since 1995. Hopefully there are no PETA people objecting to what you do.

Mr. David Arkush is the director of Congress Watch at Public Citizen. Thank you. A returning guest.

Mr. David Barker is owner of Vida Preciosa. Actually, I understand it translates to Precious International, a business specializing in research and captive breeding of pythons and boas. And I could do too much talking about those being two of the names in my old alarm company, but we will stay off of that for today.

And Mr. Mathew Palmer, who is a flight attendant at Delta Airlines, testifying on his own behalf.

And I will support the gentleman, the ranking member's statement. We do not have witnesses here to talk specifically about their litigation or to support their litigation. We agreed to have you here; we think it is appropriate because of your experience relative to the effect at Delta. But please understand that we will limit, on both sides of the aisle, on questions to not specifically pertain to any litigation.

Pursuant to the committee rules, all witnesses are to be sworn. Would you all rise to take the oath?

Raise your right hands.

[Witnesses sworn.]

Chairman ISSA. Let the record indicate that all witnesses answered in the affirmative. Thank you. Please be seated.

Now, Dr. Graham, you know the routine here pretty well, but for the rest of you, your entire opening statements, all of your printed material and any additional material you choose to present to the committee, will be included in the record. So pretty close to exactly 5 minutes you will be given to make an opening statement. You can read from your prepared notes. We strongly suggest that you use this time, though, to expand on what you have already presented to us so that both may be part of the record.

You will see the light in front of you, basically pretty straight forward. If it is green, you are fine; if it is yellow, wrap up; if it is red, please stop at the end of the full sentence, and no run-on sentences.

With that, Dr. Graham.

**STATEMENTS OF JOHN GRAHAM, PH.D., DEAN, INDIANA UNIVERSITY SCHOOL OF PUBLIC AND ENVIRONMENTAL AFFAIRS; ROBBIE LEVALLEY, CO-OWNER, HOMESTEAD MEATS AND MEMBER OF THE BOARD OF DIRECTORS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION; DAVID ARKUSH, DIRECTOR, PUBLIC CITIZEN'S CONGRESS WATCH; DAVID BARKER, OWNER, VIDA PRECIOSA INTERNATIONAL, INC.; AND MATHEW PALMER, FLIGHT ATTENDANT, DELTA AIR LINES**

#### **STATEMENT OF JOHN GRAHAM**

Mr. GRAHAM. Thank you, Mr. Chairman and members of the committee. The hearing this morning occurs at a time of our country in economic distress. The unemployment rate was 5 percent in

early 2008; it rose to over 10 percent in October 2009. Last year, it appeared the recovery was on the way, but now we appear to be stuck around 9 percent unemployment. And, as Mr. Cummings mentioned, we learned today about 15 percent of Americans are now officially recorded to be in poverty. Any sustained recovery has to have two basic things: fewer layoffs of people and more business investment in hiring.

What is the connection to the regulatory system? It has been well accepted for decades that the regulatory climate affects how businesses and consumers think about their future decisions and their investments. Right now, virtually all major sectors of our economy are facing potentially big, new regulatory burdens. I refer to manufacturing, mining, energy, agriculture, and even higher education are all about to be subject to substantial new regulatory programs.

Is the Obama administration and OIRA in a good position to handle these issues? I think we are in a good news/bad news situation. The good news is President Obama has personally and publicly expressed concern about the need for regulatory reform and he has put OIRA to work to try to streamline some existing regulations. He has also recently returned publicly a regulation to the Environmental Protection Agency that deals with ozone on the grounds that it is not a good timing from the standpoint of the economy. The Obama administration also has an administrator of OIRA, Cass Sunstein, a talented and deeply knowledgeable person about regulatory issues and about cost-benefit analysis.

The bad news we face at this time is that there is clear evidence that a number of costly regulations coming out of the Federal Government is on the rise and, perhaps more troubling, the number of costly regulatory proposals that are in the agendas of the agencies are also on the rise, and this is the prospect that is of concern to people who care about the relationship of regulation and the economy.

Now, in fairness to the administration, their argument will be, and you have heard some of this already, that the benefits of these regulations are also growing and, in fact, in some cases these benefits are larger than the costs, so maybe in some sense we are doing better even though we are feeling worse. My concern, however, is that the numbers we are talking about, in terms of benefits and costs, it is the agencies, the regulators who generate these numbers, and if OMB and OIRA do not police these numbers, they can tell a very rosy story even though the facts are in fact not in their favor.

A related concern I have is if you look at the actual record of the administration in returning regulations to agencies due to poor cost-benefit analysis, there is not a single case of a public return letter to a regulatory agency, now almost 3 years into this administration, due to poor cost-benefit analysis.

I included in my written statement an example where President Bush and President Obama basically agreed on a regulatory issue, the higher mileage standards for cars and trucks, and what I did is I showed you how the benefit and cost estimates for these regulations have changed simply in the two administrations; and all of a sudden the benefits of these mileage standards are much more substantial than they used to be. I am not sure that these changes

in the way the benefit estimates are made have a good scientific or economic foundation, but we are told now by the regulators that these mileage standards are much more beneficial than they used to be.

There are also very interesting, peculiar things going on in these regulations. You look, for example, at manufacturers who are considering whether to put a hybrid engine in or a diesel engine in or a natural gas engine in their cars. We now have a proposal from the Obama administration that if they do an electric car they get to count that car as two vehicles, instead of one, for compliance purposes; and they are also allowed to count that vehicle as if it emits zero pollution for five model years, even though we all know that pollution, to some extent, is generated back at the power plant, where the electricity comes from, and clearly that should be included in this type of analysis.

So my concern is the kinds of issues that OIRA and OIRA staff are typically very diligent about, the cost-benefit analysis underlying these rules. It is not as vigilant as I think it needs to be, and this committee needs to take a very strong interest in how these analyses are done.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Graham follows:]

Written Statement of John D. Graham, Ph.D., Dean, Indiana University School of Public and Environmental Affairs

Testimony Prepared for the OMB-OIRA Oversight Hearing, Committee on Oversight and Government Reform, House of Representatives, United States Congress

Date: September 14, 2011

My name is John D. Graham. I am Dean of the Indiana University School of Public and Environmental Affairs (IU-SPEA), a large professional school with over 2,000 students and about 100 full-time faculty on two campuses (Bloomington and Indianapolis). IU-SPEA's graduate programs in public affairs are consistently ranked in the top five in the nation, and we are recognized for our strengths in public budgeting and finance, public management, environmental policy and non-profit management. Prior to leading IU-SPEA, I was Dean of the Pardee RAND Graduate School at the non-profit RAND Corporation in Santa Monica, California.

My doctoral degree (1983) is in urban and public affairs from Carnegie-Mellon University where I studied the analytic tools of decision analysis and benefit-cost analysis. My doctoral dissertation forecasted the benefits and costs of the introduction of frontal airbags into new cars, work that was later cited in pro-airbag decisions by the U.S. Supreme Court and the U.S. Department of Transportation. During a post-doctoral fellowship at Harvard (1984), I also learned the tools of risk analysis and management, with emphasis on their application to environmental problems. I served for almost twenty years as a professor at the Harvard School of Public Health, where I also launched the Harvard Center for Risk Analysis (1990-2001). Several years ago I received the Distinguished Lifetime Achievement Award from the Society for Risk Analysis, a worldwide membership organization of 2,000 scientists and engineers dedicated to advancing the tools of risk analysis.

From 2001 to 2006 I served in the George W. Bush administration as Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget. In this capacity, I devoted much of my time and energy to improving the process of regulatory analysis in the federal government. My firm conviction is that a stronger process of regulatory analysis can result in regulations that produce more benefits and fewer costs than result from ill-informed regulations.

## ECONOMIC DISTRESS AND THE NEED FOR REGULATORY REFORM

The Committee's oversight hearing today occurs at a time when our nation's economy is in a precarious position. The financial meltdown of 2007-8 produced a severe recession, arguably the most severe since the Great Depression of the 1930s. Our nation's unemployment rate rose rapidly from less than 5% in early 2008 to a peak of 10.2% in October 2009. There is some evidence that a recovery is underway. Indeed, the unemployment rate fell steadily last year. However, the last five months of 2011 have been basically bad news on the jobs front: the unemployment rate has remained above 9.0%. And even this large rate of unemployment is understated because people who have given up looking for a job are not counted in the official unemployment rate.

Although much is unknown about what causes recessions, recoveries and persistent unemployment, one point is clear: a key feature of any sustained recovery will be fewer layoffs and more hiring by private businesses. And it has been well known for decades that the regulatory climate faced by businesses is one of a suite of important factors that influence decisions by businesses to invest in the future. (Other factors include business and consumer confidence in the future, the economic forces of globalization, trade policy, the threat of lawsuits against business, and the tax and fiscal policies of the government). When business leaders face uncertainty about federal regulation (and especially when they fear the imposition of burdensome new regulatory compliance obligations), they are understandably reluctant to make promising yet risky investments in the future of their businesses and the future of our nation's economy.

At the present time, businesses in virtually every sector of the American economy – manufacturing, energy, agriculture, health care, financial institutions, higher education and others – will soon be subjected to new federal regulatory requirements that impose expensive compliance obligations. Some of those new regulations were authorized by the Congress in well-intended legislation aimed at preventing future financial meltdowns or improving our nation's health care system. Other new regulatory programs are being initiated by the Obama administration, such as the complex set of rules aimed at slowing the pace of global climate change.

It is encouraging that President Obama and his leadership team at OMB-OIRA are aware of the precarious state of our economy and are taking modest steps to reduce unnecessary regulatory burdens. For example, the Obama administration has an

organized effort underway to reduce the compliance burdens associated with existing regulations at multiple agencies. Most recently, OMB returned to EPA for reconsideration an ambitious rule that would have caused many communities in America to be classified as a “non-attainment area” for ozone under the Clean Air Act. While EPA’s laudable objective is to reduce the adverse health consequences of breathing smog in urban communities, the unfortunate side effect of the proposed rule would have been a disincentive for businesses to expand production in the numerous, newly defined “non-attainment” areas. Since the EPA rule was not compelled by statute at this time, I think President Obama was correct to defer adoption of the rule until a later date, hopefully when the state of our economy is less precarious.

#### CONCERNS ABOUT OIRA’S ACTIVITY IN THE OBAMA ADMINISTRATION

While it is encouraging that the Obama administration is becoming more sensitive about the economic burdens of federal regulation, and is taking some steps to reduce those burdens, I am concerned that the Obama administration is not being disciplined enough about reviewing the technical quality of the cost-benefit analyses used to support federal regulatory initiatives. Let me explain the basis of my concerns, since I am certainly not aware of exactly what is happening inside the federal government on a day-to-day basis.

First, at the outset of the Obama administration, OMB raised expectations that a new, modernized executive order on regulatory oversight would be issued. In fact, the Obama administration took the unusual step of seeking public comment on how an improved executive order should be crafted. Numerous comments were received. The new and highly qualified OIRA administrator, Professor Cass Sunstein, had already written extensively, in the academic literature, on the need for a modernized executive order to revamp and strengthen OIRA.

As one of the world’s leading authorities on this topic, Professor Sunstein was obviously quite capable of drafting an improved order. For reasons that are not apparent, no improved executive order was ever issued. I believe this inaction was an important first misstep by the administration because this executive order is rightly perceived by the federal agencies (and the stakeholders in this town) as the formal foundation of the power of OMB-OIRA vis-a-vis the regulatory agencies. By failing to issue an improved executive order, the Obama administration was effectively telling everyone in this town that OMB-OIRA will have to live with less than what they need. It is not too late for the Obama administration to correct

this perception. In fact, now would be a superb time for President Obama to issue a strong executive order boosting the role of cost-benefit analysis and OIRA in the federal regulatory process. Imagine the encouraging signal that this action would send to the business community in America.

Second, all of us who track the trends in federal regulations are aware that the number of costly new regulations during the Obama administration has been steadily increasing. The number of such costly rules now pending in agencies or at OMB is also on the rise. These data are the foundation of the critics who claim that the policies of the Obama administration are “anti-business”. In defense of the Obama administration, it should be noted that the estimated benefits of federal regulations are rising even faster than the estimated costs, and thus we have the encouraging claim by Professor Sunstein that the overall net benefits of federal regulations are increasing. (I guess this is a case of “doing better, but feeling worse”). If Professor Sunstein’s claim is true, this is very good news but I fear that there may be a serious and systematic flaw in the benefit and cost numbers: the regulatory agencies may have their “thumb on the scales” when the benefit and cost numbers are generated, and there is little public evidence that OIRA is a vigorous force in ensuring the integrity of the analytic claims of agencies. I elaborate on this point below in the context of a case study of recent auto mileage standards.

Finally, the most potent power that OIRA possesses is the “return” letter. Basically, when OIRA “returns” a new rule (proposed or final) to an agency for reconsideration, OIRA is telling the agency that the quality of the “regulatory package” (draft rule plus analysis) must be improved before OIRA will “clear” (i.e., approve) it. When OIRA returns rules to agencies with a public letter, there is no ambiguity about the power of OIRA. On the other hand, when OIRA tries to persuade agencies without any return letters, it is much more difficult for OIRA staff to win their arguments with agency staff, and it is very difficult for the public and stakeholders to see evidence that OIRA is powerful. The existing order authorizes return letters precisely because it was intended and expected, rightly in my view, that OIRA would need to use this power.

As OIRA administrator from 2001 to 2006, my power would have been much diminished without use of the return letter. When I was confirmed by the Senate as OIRA administrator in July 2001, my boss, OMB Director Mitch Daniels (the current Governor of Indiana), instructed me to get busy and start “returning” bad rules to agencies for reconsideration. Mr. Donald Arbuckle, a senior career OIRA manager, and my deputy at the time, showed me how to craft and issue an effective

return letter. I then returned about a dozen bad rules in my first six months. An interesting pattern resulted: The agencies began to work with OIRA staff to improve rules rather than bypass or refuse OIRA. Indeed, my staff at OIRA taught me the following trick: you simply begin a meeting with a regulatory agency by distributing a draft return letter that will be released publicly if the agency does not improve the analysis or the rule. The longer I stayed at OIRA, the more I found that the will of OIRA was obeyed and the necessity of returning rules diminished.

What concerns me about the Obama administration is that the OIRA's practice of returning rules to agencies appears to have virtually stopped, with one notable exception: OMB's recent decision, with the backing of President Obama, to return EPA's ozone rule for reconsideration. But a close reading of this public return letter reveals that OIRA's return is not really based on a deficiency in EPA's cost or benefit analysis. President Obama is simply exercising a political judgment about when this kind of costly rule should be issued. My point is that we are now almost three years into the Obama administration, yet OIRA has not returned a single rule to a federal agency due to poor cost-benefit analysis.

#### CASE STUDY OF CONCERN: FEDERAL MILEAGE STANDARDS FOR MOTOR VEHICLES

To verify my concern that OIRA's quality-control job is not being accomplished, I decided to review a large regulatory program where Congress gave the executive branch substantial discretion and the Obama administration has responded by issuing highly expensive rules. I also picked an issue where I have expertise as an academic and where I was involved with similar rulemakings at OIRA from 2001-2006.

I chose for review the Corporate Average Fuel Economy (CAFÉ) standards for light trucks and heavy trucks, rulemakings that are now handled jointly by the U.S. Department of Transportation and the U.S. Environmental Protection Agency (EPA). The CAFÉ standards are sometimes called federal mileage standards because they compel each vehicle manufacturer to raise the average mileage of their cars and trucks. Since both the George W. Bush and Obama administrations favored large increases in the CAFÉ (i.e., mileage) standards for new vehicles, I will not focus on an area of major policy disagreement. What I will focus on is the recent quality of the regulatory impact analyses and how the RIAs (and the subtle details of the rules) have changed over the two administrations.



As a result of my review, I have identified six issues where I am concerned that DOT/EPA regulators have not engaged in careful regulatory analysis.

#### Issue #1

Under the Obama administration, DOT/EPA regulators are now enlarging the estimated benefits of CAFÉ standards by using a 3% discount rate instead of a 7% discount rate (when calculating the present value of annual fuel savings over a vehicle's life).

While OMB guidance (Circular A-4) authorizes agencies to present analytic results using discount rates of both 3% and 7%, DOT has historically emphasized the results based on 7% in CAFÉ rulemakings. In the automotive industry, it is well known that consumers have stronger preferences for money received today than for money that is received over the 15-year life of the vehicle. Those consumer preferences are apparent in the structure of sales incentives offered by dealers, in the nature of financing arrangements for new cars, and in the way consumers evaluate new technologies that are both more fuel-efficient and more expensive (e.g., a hybrid engine). The long-term average real interest rate on car loans is about 7%. (Today, average car loans apply interest rates of 5.5% to 6.5%, though these rates are expected to rise again as the economy recovers). To respect consumer preferences, DOT (with support from OMB) has historically emphasized results based on the 7% rate.

This seemingly arcane, technical matter has a powerful impact on the quantified benefits of a fuel-saving technology. For example, suppose a vehicle is driven 10,000 miles per year for 15 years and we compare the present value of fuel savings for a vehicle rated at 50 miles per gallon (MPG) to a vehicle rated at 25 MPG. We know that the 50 MPG vehicle will consume 200 fewer gallons of fuel each year than the 25 MPG vehicle (400 versus 200 gallons per year). At an average real fuel price of \$3.50 per gallon and assuming a 0% discount rate for 15 years, the 50 MPG vehicle will save consumers \$10,500 in fuel expenditures over the life of a vehicle ( $\$21,000 - \$10,500 = \$10,500$ ).

However, the additional cost of fuel-saving technology (e.g., a hybrid engine) is typically embedded in the up-front cost of the vehicle. The consumer must either pay for the technology immediately upon purchase of the vehicle, or pay a somewhat larger amount over several years through a loan or other financing arrangement. Consumers have good reason for preferring money now, to an equivalent amount of money saved in the future.

To capture this consumer preference, analysts typically apply a real discount rate to the stream of fuel savings in order to compute their “present value”. If the discount rate is assumed to be 3%, the present value of fuel savings is \$6741. At a discount rate of 7%, the present value of fuel savings is \$3801. In other words, the present value of fuel savings over the life of a vehicle is enlarged by about 77% when a discount rate of 7% is replaced with a discount rate of 3%. The choice of discount rate for use in regulatory analysis has historically been controlled by analysts at OMB-OIRA but it is not clear who in the Obama administration is responsible for this analytic change.

#### Issue #2

DOT/EPA regulators are not considering the possibility that world oil prices might fall as well as rise between now and 2025.

One of the crucial (but most difficult) inputs to forecast is the future world price of oil and the corresponding price of gasoline at the pump in the United States. During the Bush administration, the forecasted average price of gasoline at the pump in 2030 was about \$2.16 per gallon (in 2003\$). At OMB, we believed that these forecasts, made by the independent Energy Information Administration, were too low. We encouraged DOT to consider some higher price trajectories in regulatory analysis, which they did. But DOT regulators dutifully used the EIA forecasts in their main CAFÉ analyses. During the Obama administration, the forecast of future fuel prices has been upped by EIA to an average of \$3.68 per gallon (in 2008\$). Since savings of fuel are the primary economic benefit of DOT’s tighter CAFÉ standards (or EPA’s carbon standards), the large increase in the forecasted price of gasoline has caused a large increase in the estimated consumer benefit from more fuel-efficient cars.

Although policy makers are right to be concerned about rising oil prices and energy security, they also need to consider the possibility that world oil prices may not rise. In other words, it is not obvious that the future path of oil and fuel prices will be as pessimistic as EIA and the Obama administration are assuming. The recent developments in Libya and Iraq could contribute to a buttressing of long-term global oil supplies while the diminishing rates of growth in the economies of China and India may lessen the rate of growth in worldwide demand for oil. Meanwhile, U.S. and Canadian oil production are on the rise, and may rise sharply in the future due to technological innovations and the discovery of vast new reserves offshore and onshore. In light of the slowing growth rate in the global

economy and other recent supply developments, a variety of private and international forecasters are already lowering their predictions for the path of future oil prices. In other words, the financial benefit of driving a 50 miles-per-gallon car may not prove to be as large – over the 15-year life of the vehicle – as the Obama administration projects it will be today. DOT/EPA regulators should acknowledge this possibility in regulatory analysis.

### Issue #3

Under the Obama administration, DOT/EPA regulators are now deflating the size of the “rebound effect” (the extra miles driven in fuel-efficient vehicles), an analytic change that has the effect of enhancing the net fuel savings from CAFÉ standards and reducing the congestion and pollution impacts of additional vehicle miles of travel.

Consumers are likely to increase their annual miles of vehicle travel when their fuel-inefficient vehicle is replaced by a more fuel-efficient vehicle. This “rebound effect” in travel behavior is predicted because improved fuel economy reduces the marginal cost of an additional mile of travel. Although the direction of this effect is clear, there is technical disagreement among experts about how large the rebound effects is likely to be.

Prior to the Obama administration, DOT regulators typically used a 20% rebound effect in the main regulatory analysis, and then conducted sensitivity analyses with rebound effects as large as 25% and as low as 5%. During the Obama administration, the assumed rebound effect has been cut in half by regulators, from 20% to 10%. By reducing the rebound effect, the NET fuel savings of higher mileage standards are enlarged while the adverse impacts of additional travel (e.g., increased congestion and pollution from tailpipes) are curtailed. (From an environmental perspective, more is assumed to be bad because it results in more greenhouse gas emissions, more smog and more soot in the air. On the other hand, there is also a mobility benefit from the additional travel). Since the rebound effect is expected to be larger when fuel prices are high than when fuel prices are low, and since the Obama administration is forecasting long-term rises in real gasoline prices, it is not clear why the rebound effect has been cut in half. For example, the key studies that support a rebound effect as low as 5-10% are based on fuel prices that are much lower than the average price of gasoline that the Obama administration is assuming. This is another example of an analytic issue that has historically been controlled by OMB but it is not clear who ordered this change in the Obama administration.

## Issue #4

Under the Obama administration, DOT/EPA regulators have added a new category of “social” benefit from tighter mileage standards, a savings of \$21-\$45 for each ton of carbon dioxide that is not emitted into the atmosphere due to higher-mileage vehicles.

When a vehicle burns less gasoline, the result is fewer emissions of greenhouse gases (especially carbon dioxide) into the atmosphere. DOT/EPA regulators are engaged in a well-intended effort to capture the global benefits of reducing carbon-dioxide emissions from new vehicles in the United States. The specific figures are based on a federal interagency study, which is in turn based on peer-reviewed estimates of the marginal damages worldwide from additional greenhouse gas emissions. Although this new benefit category does not have a large impact on the overall benefit estimates reported by DOT/EPA, it again enlarges the overall benefits of stricter CAFE standards. While I am comfortable with the determination that greenhouse gases are linked to global climate change, I think the impact of climate change on the economy, public health, and the environment entails far more uncertainty than is captured by this two-fold range of damage estimates. To their credit, DOT/EPA are reporting sensitivity analyses with even larger ranges of damage estimates, though even those ranges seem too small to me.

Another uncertainty is the assumption that reducing greenhouse gas emissions from the U.S. transport sector will have a meaningful effect on global climate change. Since global climate change arises from global sources, including those in China and India, it is difficult to see how US action alone can produce a meaningful reduction in the pace of global climate change. In fact, if reductions in US oil consumption from tighter CAFE standards cause global oil prices to rise less rapidly, the resulting rise in oil consumption in the developing world will cause a perverse, offsetting rise in their greenhouse gas emissions (an effect called “leakage” by climate-policy specialists). In other words, the analysis prepared by DOT/EPA regulators appears to be making a naïve analytic assumption that the damages from global climate change can be addressed significantly by the United States, without unified global action.

## Issue #5

Under the Obama administration, DOT/EPA regulators are planning large increases in vehicle mileage standards without careful consideration of engineering impacts on vehicle size, performance, and safety.

Conceptually, the “costs” of tighter mileage standards include the costs of fuel-saving technology plus the monetary value of any other losses in vehicle attributes (e.g., safety) that consumers value. But DOT/EPA regulators are focusing their cost estimates on the fuel-saving technologies, without giving adequate consideration to the other vehicle attributes.

Over the past 25 years, the improved fuel efficiency of motor vehicles has been offset significantly by the sustained improvement in the size, performance, and safety of motor vehicles. Larger vehicles with more seating capacity and leg/trunk space tend to consume more gasoline due to their extra weight and aerodynamic factors. Engines that deliver more horsepower tend to consume more energy. Vehicle designs with more safety features tend to consume more fuel due to the added weight (e.g., a car with five airbag systems weighs more than a car with no airbag systems). A key analytic issue for DOT/EPA regulators is whether the quest for more energy savings will inadvertently hurt consumers by causing vehicle manufacturers to produce cars and trucks that do not satisfy customer preferences for vehicle size, performance and/or safety.

During the Bush administration, DOT/EPA regulators accepted the size, performance and safety characteristics embedded in the confidential production plans of vehicle manufacturers, since these production plans were assumed to be responsive to projected consumer preferences. As a result, it was reasonable for DOT regulators to assume that the cost of tighter mileage standards was simply the cost of the fuel-saving technologies necessary to meet the standards.

Under the Obama administration, however, the regulatory mandates are being set for model years (as late as 2025) that are beyond the production planning horizon of major vehicle manufacturers. It is therefore critical that a target such as 50 MPG in 2025 be accompanied by an analysis of consumer preferences for vehicle size, performance, and safety. As far as I can tell, the DOT/EPA regulators have not engaged in any such analysis and thus there is a risk that further improvements in vehicle size, performance and safety will be foregone by stringent federal mileage standards.

Under the Obama administration, special compliance credits will be awarded by EPA for electric-vehicle technology, even though such credits have a questionable cost-benefit justification.

The Obama administration has already invested billions of taxpayer dollars (through production subsidies and loans awarded by the U.S. Department of Energy) to enhance the competitive position of the electric vehicle industry. For private investors in electric vehicles, government support is needed because automotive applications of lithium-ion battery technology are not yet economically competitive. According to the National Research Council, the incremental production cost of a battery-operated car (like the Nissan Leaf) is \$10,000-\$20,000 more than a gasoline-powered vehicle of similar size and performance. The fuel savings from use of low-cost electricity are not nearly large enough to pay the cost premium for large automotive battery packs.

The Obama administration recently announced that regulatory policy will also be used to favor electric cars (as well as fuel cells and other battery-related technologies), even though no benefit-cost analysis was published to support this policy change. While DOT is precluded by law from offering lucrative compliance credits for electric vehicles, the Obama administration is using EPA's more discretionary authority under the Clean Air Act to achieve the same result under its greenhouse-gas control program for motor vehicles. In effect, auto makers will be permitted to count an electric car as two vehicles instead of one when a manufacturer's compliance statistic for emissions is computed by regulators. This "incentive multiplier" declines gradually from 2.0 in model year 2017 to 1.5 in model year 2021. But the regulatory preference for electric cars does not end with the incentive multiplier. Fearing that government subsidies and incentive multipliers may not be sufficiently lucrative, the Obama administration also announced that electric vehicles will be assumed to cause zero pollution for model years 2017-2021, even though it is well known that use of electric vehicles cause air pollution indirectly at the powerplant (where electricity is produced). Special considerations are also to be offered for fuel cells, plug-in hybrids and conventional hybrids used for heavier trucks. The zero-pollution compliance figure will encourage vehicle manufacturers to offer electric cars instead of conventional hybrid engines, advanced diesels, or natural gas vehicles.

The case for "advanced vehicle" compliance incentives is weak because California regulators are already engaged in this activity. Since the Obama administration has been unwilling to restrain the ambitions of California regulators, vehicle

manufacturers will be compelled to comply with California's "Zero Emission Vehicle" (ZEV) program for new vehicles sold in California (and other states that together comprise more than 25% of new vehicle sales in the U.S.). If one is to believe that federal incentives for advanced vehicles are necessary (e.g., to overcome barriers to introduction of new technologies), then the EPA compliance incentives should have used as a baseline the impacts of the California ZEV program and the DOE grants and loan guarantees. What little analysis EPA has performed seems to suggest that greenhouse gas emissions will actually be enlarged by the compliance incentives for advanced vehicles (since the special credits allow vehicle manufacturers to offset the advanced vehicle sales by selling more vehicles with higher-than-average greenhouse gas emissions).

Interestingly, the European Commission considered and rejected similar compliance credits for electric-vehicle technology two years ago because the Commission determined that special credits would not reduce greenhouse gas emissions and they might actually exacerbate emissions. The European Commission was also concerned that special considerations violate the principle of "technology neutrality". In other words, regulatory policy that favors battery-operated vehicles may have the inadvertent effect of hurting investments in other promising technologies such as natural gas vehicles, advanced diesel-powered vehicles, cellulosic ethanol, and other innovative ideas that DOT/EPA regulators cannot foresee today. In other words, the Obama administration appears to be entrusting less faith in competitive markets to choose the best technologies than is the European Commission in Brussels.

#### Summary of Case Study

Based on the six issues that I have discussed in the case study, I am quite concerned that DOT/EPA regulators are not engaged in thoughtful regulatory analysis prior to making their regulatory determinations about the future of federal mileage and greenhouse gas standards. While I am not privy to the internal deliberations of the Obama administration, I find it hard to believe that these issues would have been handled the way they were if OMB-OIRA had been significantly involved in the deliberations. I encourage the Obama administration to harness the talents and expertise of OIRA in a concerted effort to improve the quality of regulatory analysis at federal agencies. Congress should make it very clear to the OMB Director and the OIRA administrator that Congress cares about the quality of cost-benefit analysis, that Congress expects poorly analyzed rules to be returned publicly to agencies for reconsideration, and that Congress is willing – through

authorization or appropriations language – to give OIRA the tools that are necessary to do its job effectively.



Chairman ISSA. Thank you, Doctor, and thank you for being the consummate professional on the 5-minute rule.

Ms. LeValley.

#### **STATEMENT OF ROBBIE LEVALLEY**

Ms. LEVALLEY. Thank you, Mr. Chairman, Ranking Member Cummings. I have been a beef producer all of my life and my two boys represent the fourth generation on our ranch. In addition to our ranch, my family and I are co-owners of Homestead Meats, a direct beef marketing business that owns and operates a packing plant regulated by USDA. So not only do I produce high quality cattle, I also took the initiative to process and package beef in order to provide a great eating experience for my customers.

Our business is built on relationships and marketing alliances that allow me to produce a high quality beef that my customers demand, quality for which we get paid a premium for. The proposed GIPSA rule, however, will cripple our ability to market cattle the way we want, impacts our small business model, and limits consumer choices.

I strongly believe in the fundamental American business tenet of a willing buyer and seller being able to enter into a private business contract because it protects my cattle marketing contracts and it is the heart of our small business. GIPSA believes my contract should be approved by the government and posted on the Internet. It goes on to say that because I am part owner in a packing plant, I should not be able to sell my cattle to other packers. This provision violates privacy and limits business opportunities.

For years, USDA has promoted exactly what we are doing: sell direct to the consumer, operate as a packing plant in a strategic area of the country and produce local food. We responded to consumer demand, we followed USDA's lead, and now we are being punished. This is a slap in the face to innovative businessmen and women across the United States.

The proposed GIPSA rule offers neither clarity nor clear definition in terminology. Elimination of the competitive injury requirement will provide a disincentive for value-added marketing because of fear of litigation. The vague definition such as "unfair" or "reasonable person" will open the door to an increased number of lawsuits because mere accusations without economic proof are enough for USDA or an individual to bring lawsuits against a buyer. This will be a trial lawyer's dream and will cause cattle prices to spiral downward.

Does increased government intervention and litigation determine fairness, and who pays for this? Cattle producers will pay. What happens to every other industry when litigation increases? Creativity, partnerships, balance and the desire to take a chance end, which is the very basis of the entrepreneurial spirit of the American business owner. Do you truly want that for the beef industry or the livestock industry?

This rule requires buyers of cattle to justify the price paid for my livestock. And what will be the justification and who sets that? This regulation seems to infer that it is the role of big government, and I strongly oppose the government setting or justifying the prices paid for my cattle.

I have serious concerns about the process behind this rule. As you know, the rule is a result of language included in the 2008 Farm Bill. However, we believe the rule published goes beyond the intent of Congress because it includes provisions that are similar to ones that were defeated by votes on the Senate floor or through subcommittee or through committee action. This rule did not include a cost-benefit analysis. NCBA was one of several groups that commissioned an independent analysis by Informa Economics to look at the impact. The report concluded this rule would result in the loss of over 23,000 jobs, annual GDP loss of \$1.6 billion, and annual tax revenue losses of \$360 million. This is well over the \$100 million threshold to be considered economically significant. But the rule was not treated that way.

We appreciate the letter sent by 147 Members of the House of Representatives asking for a full cost-benefit analysis, but Secretary Vilsack has said the analysis won't be open for review or comment. The report also estimates annual costs of \$62 million just to cattle producers alone. Overall, we believe the process in formulating the rule is flawed and broken.

Value-based marketing has given our family and given families across the United States the business opportunity to compete for market share at the highest level. It accounts for 62 percent of the actual cattle contracts across the United States, is value-based marketing. We do not need big government setting up shop on our farms and ranches, and government intrusion into the private marketplace is not the answer.

I urge the committee to help stop this rule from being finalized, as it is detrimental to ranchers, consumers, and the entire U.S. economy. Thank you.

[The prepared statement of Ms. LeValley follows:]

Mr. Chairman, Ranking Member Cummings, members of the committee, my name is Robbie LeValley and I am a cow-calf producer and small meat packer from Hotchkiss, Colorado. I am the immediate past president of the Colorado Cattlemen's Association (CCA) and a member of the Board of Directors for the National Cattlemen's Beef Association (NCBA). I have been a producer all of my life, first in Wyoming, and now in Colorado. My family and I are co-owners of Homestead Meats, a direct-beef marketing business that has been in operation since 1995. There are six families who co-own this small business and we employ 13 full-time employees. Each family markets one-third of their cattle through this business, with the remaining two-thirds being directly marketed to other feedlots. To enhance its direct-marketing beef business, Homestead Meats owns its own packing plant regulated by the United States Department of Agriculture (USDA), therefore making us cattle producers, cattle feeders, and beef packers. We have chosen this small business model as a way to differentiate our product, brand our beef, and provide ourselves with our own dedicated marketing program, as well as providing jobs for the local economy. USDA's Grain Inspection, Packers and Stockyards Administration's (GIPSA) proposed rule on livestock and poultry marketing will destroy our small business model, force us to lay off our employees, cripple our ability to market our cattle the way we want to, and limit consumer choice.

The cow-calf side of our business is built on relationships and alliances throughout the beef chain. We have successfully marketed our calves through an alliance with a packer for several years. That alliance has created a relationship that provides feedback from the packer on the quality of our cattle – quality for which we get paid a premium price. I have used this information to select specific genetic traits known for increased marbling as a way to improve my cattle in order to continue this significant increase in the premium price I receive. The proposed rule would require my packer partner to justify any discount or premium paid to us. USDA would then review these transactions and make determinations of violations based upon its judgment, not marketplace economics. The contracts would then be posted on a USDA website. These contracts are private business transactions and should not be made available for public review and scrutiny, much less end up on a USDA website. I strongly believe in the fundamental American business tenet of a willing seller and a willing buyer being able to enter into a private business transaction because it protects my pricing and marketing mechanisms. I willingly and knowingly entered into this alternative marketing arrangement and it has worked well for our family's small business model. Our cattle marketing contracts are the heart of our small business and they do not warrant being posted on the internet, receiving additional government intervention and oversight, or being subject to potential litigation.

As mentioned, approximately one-third of our calves enter into our Homestead Meats company and are directly sold to consumers. This value-based marketing strategy was entered into by six families as a way to reap the rewards of quality cattle. Our consumers have been clear – they want high quality beef that is consistent in taste and tenderness each and every time they purchase our steaks and ground beef. For years, the beef industry generally produced beef without any concern to what our customers really wanted. As a result, demand for beef declined in the 80's and early 90's. During that time, we started listening to the consumer demand for tenderness, leanness, natural, and

other traits and production methods. This demand gave rise to programs such as Laura's Lean Beef, Certified Angus Beef, and numerous other branded products such as mine. Our customers responded and beef demand recovered and grew. Losing our ability to adequately differentiate our product will take choices away from the consumer and ultimately hurt our sales and profitability.

The six family co-owners of Homestead Meats are small businessmen and women who support our local economy. When the proposed rule says that packer to packer, and their subsidiaries, sales are banned, I believe the six families potentially will not be able to sell to other packers. This means that the other two thirds of our cattle can no longer be marketed the way we want them to. This is a great example of how this rule truly harms small producers and processors. For years, USDA has promoted exactly what we are doing - selling directly to the consumer; operating as a small processor in a strategic area of the country; being rewarded for adding value to the end product; and producing local food. However, under this rule, our marketing options will be limited because we were innovative and took market risks. Again, it is both cattle producers and our customers that lose.

Another concern that I have with the proposed GIPSA rule is that there is neither clarity nor clear definition in terminology. Elimination of the competitive injury requirement, the new definitions of "competitive injury" and "likelihood of competitive injury" will provide a disincentive for packer premiums and value-added contracts because of the fear of litigation. The vague definitions, such as "unfair" or "reasonable person" will open the door to an increased number of lawsuits because mere accusations, without economic proof, would suffice for USDA or an individual to bring a lawsuit against a buyer. This will be a trial lawyer's bonanza and will devastate small businesses such as mine. In addition, the proposed rule allows for persons to sue without proof of injury or harm - they just have to say that their price was not fair. Who determines fairness? Will increased government intervention and litigation determine fairness? Arbitrary judgment by a federal agency will only increase paperwork and costs for small business owners like me. Who pays for this increased intervention and litigation? I will. When costs increase for the processor, the trickle down effect is to decrease the price paid to the ranchers who supply the cattle. The proposed rule is not clearly understood, and the unintended consequences are far reaching across this industry.

What will be the consequence when the costs of defending prices paid for my cattle and complying with this rule add to my operating costs? What happens to every other industry when litigation and costs increase? No one takes a risk or sticks their necks out, for fear of reprisal. This ends creativity, partnerships, and the desire to take a chance - which is the very basis of the entrepreneurial spirit of America's small business owners. Do we truly want that for the beef industry?

In short, the proposed GIPSA rule would negatively impact producers, small businesses, and consumers in the following ways:

*Lost Opportunities and Lost Profits:* NCBA members are concerned this regulatory proposal, coupled with the risk of litigation from USDA and citizen suits, likely would

cause buyers to withdraw marketing arrangements rather than run the risk of litigation, civil penalties, and potential revocation of licenses. If marketing arrangements are restricted, I, my family, and my consumers would be the losers. The proposed regulation would restrict cattle producers' freedom to market their cattle as they see fit. It would limit their opportunity to capture more of the value of their cattle, and eliminate important risk management tools.

The proposed regulations ultimately may remove products consumers prefer. Producers have responded to consumer demand by finding innovative ways to develop and market premium quality and branded beef products. These alternative marketing arrangements have allowed producers to get paid for the added value. These arrangements ensure a consistent supply of cattle that meet the requirements of such programs. Without this consistent supply, these programs cannot be sustained.

The 2007 USDA GIPSA Livestock and Meat Marketing Study found that reducing or eliminating the use of alternative marketing arrangements (AMAs) would negatively affect both producers and consumers. No segment of the beef industry, from the ranch to the consumer, would benefit from the reduction or elimination of these marketing arrangements. The GIPSA study results showed if AMAs were reduced 25%; the 10-year cumulative effect would be a loss of \$5.141 billion for feeder cattle producers, and a loss of \$3.886 billion for fed cattle producers. If marketing arrangements were eliminated, the 10-year cumulative losses for feeder cattle producers would be \$29.004 billion, and fed cattle producers would lose \$21.813 billion.

*Loss of Privacy/Risk of Litigation:* The proposed regulation requires packers to file copies of marketing arrangements with USDA. Packers may assert some information is confidential and request that it not be released. However, producers who are parties to the marketing arrangements would not have the same opportunity to claim privacy. This means confidential producer information could be posted on USDA's web site for producer competitors to view. The regulation would lessen the burden for bringing an action against a packer. Packer livestock purchase records likely would be a part of any litigation. Producers participating in questioned transactions likely would be drawn into the litigation.

*Negative Restructuring of the Industry:* NCBA members believe the proposed regulation prohibiting packer-to-packer sales, and the potential elimination of marketing arrangements, likely would encourage vertical integration. In order to satisfy consumer demand currently being met through the use of marketing arrangements, packers may choose to own livestock in larger numbers (today, packers directly own less than 5% of the market) rather than risk litigation.

The proposed regulation would require buyers of my cattle to justify paying more than a "standard price" for my livestock. What is a standard price and who sets it? The regulation seems to infer that is the role of government. I strongly oppose government setting "standard prices" for my livestock.

I also have very serious concerns about the process behind this rule. As you know, the rule is the result of language included in the 2008 Farm Bill. However, we believe that the rule that was published goes beyond the intent of Congress. The five provisions in the Farm Bill were very specific, but this rule includes provisions that are very similar to provisions that were actually defeated by votes on the Senate floor, or through subcommittee or committee action on both the House and Senate side.

To compound the situation, it was very unclear as to what would, or would not, be considered as part of the record. Throughout 2010, USDA and the Department of Justice (DOJ) held workshops across the country on competition in agriculture. This rule was published while these workshops were going on, and we as producers were told that the workshops would not be a part of the record (or even had anything to do with the rule), but at the livestock workshop in August of 2010 (after the rule had been published in June), the Secretary said that comments made would be considered. This uncertainty has added to our frustration. It is also uncertain just how the over 60,000 comments received by USDA were sorted and considered.

The rule that was published also did not include a thorough economic analysis. Because of that, NCBA was one of several groups that commissioned an independent analysis by Informa Economics to look at the impact. The Informa report came back and said that this rule would result in the loss of over 23,000 jobs, annual GDP loss of \$1.56 billion, and annual tax revenue losses of \$360 million. As you can see, this is well over the \$100 million threshold to be considered an economically significant rule, but yet the initial rule was not treated as economically significant. At a Senate Agriculture Committee hearing in July of this year, USDA's Chief Economist, Joe Glauber, admitted that the rule was economically significant and that he was conducting a cost/benefit analysis. Unfortunately, Secretary of Agriculture Tom Vilsack has said that none of the stakeholders will be able to review or comment on the USDA analysis, even after a letter was sent by 147 members of the House of Representatives asking for a review and comment period. Overall, we believe that the process in formulating and considering this rule is flawed and broken.

Value based-marketing has given our small family business the opportunity to compete for market share at the highest level. The consumer has been the one to determine the fair and justified price paid for the value added product, not USDA. As a result, I have been able to build a small business that supports the local economy and provides consumers with the products they want. Each step I take has been a private business contract between a willing buyer and a willing seller. I do not want increased scrutiny or increased litigation in my private business contracts. Government intrusion into the marketplace is not the answer. Therefore, I encourage the Committee to help us stop this rule from being finalized as it is detrimental to small businesses like mine.

Chairman ISSA. Thank you.  
Mr. Arkush.

#### STATEMENT OF DAVID ARKUSH

Mr. ARKUSH. Thank you, Mr. Chairman. I think all of us here agree that the regulatory process is, in some sense, broken. I disagree, I think, with a lot of people here on how exactly it is broken. What I see in the record before this committee is strong evidence of enormous net benefits to health, safety, and the economy; and, given those benefits, it is surprising that we make it so hard for our public protection agencies to do their jobs.

So on the benefits of regulations, there are obvious enormous human benefits from public protections. We are talking about millions of lives, people's health, children's IQ points, clean air, clean water. I have a lot of specifics in my written testimony; I am not going to go into that in any greater depth.

It is controversial to try to put these benefits in narrow, economic terms because it is hard to put a price tag on them. It is easy to understate benefits when we look at them monetarily and it is easy to overstate costs. But even when you look at regulation and evaluate it through this narrow lens of economic cost-benefit analysis, the benefits are overwhelming and they overwhelm the costs consistently. The authoritative resource on this is the annual report from OMB to the Congress evaluating the past 10 years' major regulations.

Across both the Bush administration and the Obama administration, these reports have come out every single year showing massive overwhelming benefits of regulations compared to their costs. The most recent report showed that, on average, over the last 10 years, health, safety, and environmental regulations have had benefits 7 times as great as their costs. That is a 700 percent return on investment. It is hard to find that kind of return on investment anywhere in the United States, but you can find it from our regulatory agencies.

An often-overlooked benefit of regulations is that they can drive innovation. As Mr. Connolly was saying in his opening remarks, the auto industry, by fighting fuel economy standards for two decades, put itself at a severe disadvantage when consumers' preferences shifted and consumers desired much more fuel-efficient vehicles, and the U.S. auto industry had a disadvantage compared to foreign manufacturers who had been focusing on fuel economy. Fuel economy standards would have forced auto manufacturers to make the decisions that it turns out consumers actually wanted and bring their fuel standards into the twenty-first century.

Another often missed benefit of regulation is that it can actually help grow jobs. In the current economy, our principle problem is a lack of demand. A lot of companies have idle cash sitting around that they are not investing in their businesses because they are afraid that if they invest in new products or services there won't be any demand for those products or services. It is a good time to enact public protections that will bring those industries into the twenty-first century in terms of environmental protections or worker protections and, in the process, use that idle cash to buy up-

grades in equipment or hire service people or build other improvements to processes that will boost the economy and create jobs.

We also shouldn't overlook the harms of deregulation. The big example in this area recently is the financial crisis. The financial sector was deregulated over the past several decades and, in short order, it collapsed on itself. It imploded under the weight of its own reckless and predatory practices in the absence of good government oversight. The costs are hard to overestimate in this area. We are 11 million jobs behind where we should be in the U.S. economy, if not for the great recession. The financial crisis evaporated trillions of dollars worth of wealth and cost billions and trillions of dollars of government bailouts and other supports.

So here is how the system is broken. Given all the benefits of regulation and given the severe harms of under-regulation, we make it far too hard for our public protection agencies to do their jobs. The agencies that protect our health, safety, and environment are some of the most heavily regulated entities in the United States. They have to comply with the Administrative Procedure Act; the Paperwork Reduction Act, which creates paperwork; the Unfunded Mandates Reform Act; the Regulatory Flexibility Act; the Small Business Regulatory Enforcement Fairness Act; the Congressional Review Act; several executive orders; and they are subject to judicial review. In all, there are as many as 110 requirements an agency needs to comply with just to write a rule.

As a result, even when an agency wants to write a simple, non-controversial rule, it can take up to 10 years. My organization published a report earlier this year talking about one of those examples. The construction industry got together with labor unions and public interest groups; everybody thought we needed a new rule to protect crane safety. It still took 10 years to produce because of the burdens on OSHA.

Here is the important point. When rules have massive economic benefits, there are equally massive costs when we delay the creation of those rules. On average, the OMB estimates that the benefits of rules outweigh the costs by \$9 to \$59 billion a year. That means that when we delay major rulemakings by 1 year, we are costing the U.S. economy \$9 to \$59 billion. We need to give public protection agencies the resources they need to do their jobs and we need to reduce unnecessary burdens on them.

Thank you.

[The prepared statement of Mr. Arkush follows:]



Mr. Chairman and members of the Committee:

Thank you for the opportunity to testify on the U.S. regulatory system. I am David Arkush, director of Public Citizen's Congress Watch division. Public Citizen is a national nonprofit organization with over 225,000 members and supporters.

Generations of Americans have benefited from federal safeguards that protect everything from our food and water to our cars and workplaces. The record of U.S. regulation is one of striking success. They have saved millions of lives and benefited the economy by trillions of dollars. Recent events like the financial meltdown and BP oil spill have demonstrated the severe costs of a lack of strong, effective oversight. But the regulatory process is broken and needs fixing. Under current law, it is far too difficult for agencies to do their jobs and provide the protections that the public and the economy need. Policymakers should work to reduce unnecessary burdens on our regulators and ensure that they can write common sense rules without the delays that currently costs millions of lives and billions of dollars.

#### **I. PUBLIC SAFEGUARDS HAVE BEEN CRITICAL TO AMERICA'S SUCCESS.**

Discussions about regulation often center around a purported conflict between government oversight and the "free market." In these discussions, regulation is portrayed as a drag on the market, hindering economic growth. But the distinction between government and markets is false, as is the notion that regulation stands in opposition to economic growth.

There can be no markets without regulation. Regulation is what structures markets and brings them into existence. At a minimum, market exchange is impossible without property rights. The notion of property, in turn, is meaningless without a government to define and enforce it, with coercive measures like police and prisons, if necessary.<sup>1</sup> This point may seem trivial or irrelevant to contemporary debate on regulation, but it is not. When Environmental Protection Agency (EPA), acting under authority delegated to it by the Congress, regulates the emissions of a pollutant, the EPA is in one sense defining the boundaries of property rights: It is defining what the owners of power plants can do with their property—in particular, how much damage they can do to other people's property (not to mention physical health).

All of this is to say that it doesn't make much sense to talk in the abstract about whether we should have regulation, or how much. The real questions are what kinds of

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<sup>1</sup> See, e.g., Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW* 641, 651-52 (David Kairys ed., 3d ed. 1998).

regulations we want, and how to ensure that they are effective. As for the types of regulations currently under attack in Washington political debates—the record of their success is remarkable.

**A. Health, safety, and environmental regulation have provided immense benefits to Americans.**

Overwhelming evidence demonstrates that health, safety, and environmental regulation has vastly improved the lives of Americans in recent decades. Although they are not without significant flaws, federal agencies like the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), the National Highway Transportation Safety Administration (NHTSA), the Consumer Product Safety Commission (CPSC), and the EPA have made remarkable progress in protecting public health, safety, and the environment. Below, I highlight a few of their successes, organized by issue area.

*1. Worker safety*

- Immediately prior to the creation of OSHA in 1970, an average of 14,000 workers died annually from occupational injuries. In 2009, despite a doubling of the size of workforce, deaths on the job had been reduced to 4,340.<sup>2</sup>
- A rule requiring the cotton industry to reduce dust in textile factories lowered the prevalence of brown lung disease among workers by 97 percent, from roughly 50,000 cases in the early 1970s to roughly 1,700 in the mid-1980s.<sup>3</sup>
- A rule requiring employers to place locks and warning labels on powered equipment is credited with preventing 50,000 injuries and 120 fatalities per year.<sup>4</sup>
- A rule on excavations at construction sites has reduced the fatality rate from cave-ins by 40 percent.<sup>5</sup>
- A grain-handling facilities standard has reduced the number of fatalities caused by dust-related explosions by 95 percent.<sup>6</sup>
- And a 1969 mine safety law led to a rapid 50 percent decrease in the coal mine fatality rate.<sup>7</sup>

<sup>2</sup> AFL-CIO, *Death on the Job: The Toll of Neglect*, 35 available at [http://www.aflcio.org/issues/safety/memorial/upload/dotj\\_2011.pdf](http://www.aflcio.org/issues/safety/memorial/upload/dotj_2011.pdf).

<sup>3</sup> OCCUPATIONAL SAFETY & HEALTH ADMIN., OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD ii, 28-33 (2000), available at <http://www.osha.gov/dea/lookback/cottondust/final2000.pdf>.

<sup>4</sup> OSHA, Control of Hazardous Energy (Lockout/Tagout) available at <http://www.osha.gov/SLTC/controlhazardousenergy/index.html>.

<sup>5</sup> OSHA, "Regulatory Review of 29 CFR 1926, Subpart P: Excavations" (2007) at 36 available at [http://www.osha.gov/dea/lookback/excavation\\_lookback.html](http://www.osha.gov/dea/lookback/excavation_lookback.html).

<sup>6</sup> OSHA, "Regulatory Review of OSHA's Grain Handling Facilities Standard" (2003) at 31 available at <http://www.osha.gov/dea/lookback/grainhandlingfinalreport.html>.

## 2. Food and drug safety

- Improved regulation of slaughterhouses and meat-processing plants significantly decreased the incidence of food-borne illnesses caused by tainted beef between 1996 and 2001, including a 49 percent decrease traced to *Yersinia*, a 35 percent decrease traced to *Listeria*, a 27 percent decrease traced to *Campylobacter*, and a 15 percent decrease traced to *Salmonella*.<sup>8</sup>
- FDA's effective implementation of the Food, Drug, and Cosmetics Act blocked thalidomide from being marketed in the U.S., where it likely would have caused thousands of birth defects.<sup>9</sup>

## 3. Auto safety

- NHTSA's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicles traveled in 1980 to 1.41 fatalities per 100 million vehicles traveled in 2006.<sup>10</sup>

## 4. Environmental protections

- EPA regulation of pollution discharge into water bodies under the Clean Water Act nearly doubled the number of waters meeting statutory water quality goals from around 30–40 percent in 1972 to around 60–70 percent in 2007.<sup>11</sup>
- Clean Air Act rules saved 164,300 adult lives in 2010. In February 2011, EPA estimated that by 2020 they will save 237,000 lives annually. EPA air pollution controls saved 13 million days of lost work and 3.2 million days of lost school in

<sup>7</sup> Weeks and Maier, *Fatality Rates and Regulatory Efforts in Bituminous Coal Mining, United States, 1959-1981*. 12 American Journal of Public Health 1278-1280 (1983).

<sup>8</sup> Ctrs. for Disease Control & Prevention, U.S. Dept. of Health & Human Servs., *Preliminary FoodNet Data on the Incidence of Foodborne Illnesses—Selected Sites, United States, 2001*, 51 Morbidity & Mortality Wkly. Rep. 325, 327 (2002), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5115.pdf>. Officials from the Centers for Disease Control and Prevention (CDC) attribute much of this reduction in food borne illnesses to a new health and safety program for slaughterhouses and meat-processing plants called the Hazard Analysis and Critical Control Point (HACCP) program, which the Department of Agriculture's Food Safety and Inspection Service began implementing in 1996. Robert Roos, *Foodborne Bacterial Disease Rates Dropped 23% from 1996 to 2001, CDC Says*, Ctr. for Infectious Disease Res. & Pol'y, <http://www.cidrap.umn.edu/cidrap/content/fs/food-disease/news/foodnet.html>.

<sup>9</sup> Maureen Rouhi, *The Top Pharmaceuticals That Changed the World: Thalidomide*, Chem. & EngineeringNews, June 20, 2005, available at <http://pubs.acs.org/cen/coverstory/83/8325/8325thalidomide.html>.

<sup>10</sup> RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* 12 (2010).

<sup>11</sup> G. Tracy Mehan, *The Clean Water Act: An Effective Means To Achieve a Limited End*, Water Environment & Technology, Oct. 2007, available at [http://www.wef.org/publications/page\\_wet.aspx?id=4692&page=ca&section=CWA%2035th%20Anniversary](http://www.wef.org/publications/page_wet.aspx?id=4692&page=ca&section=CWA%2035th%20Anniversary).

2010, and EPA estimates that they will save 17 million work-loss days and 5.4 million school-loss days annually by 2020.<sup>12</sup>

- EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children ages 1 to 5. During the years 1976 to 1980, 88 percent of all U.S. children had blood levels in excess of 10µg/dL; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that dangerous amount.<sup>13</sup>

This is only a small, selective list of some of the regulations that play a vital role in protecting American lives and the natural environment.

**B. Even when viewed in narrow economic terms, the benefits of major regulations have vastly outweighed the costs.**

Evaluating the costs and benefits of regulation through the narrow lens of money is difficult and controversial. Questions abound about the value of the most important regulatory benefits—things like cleaner air, and longer, healthier lives—and these benefits are often undercounted or even omitted entirely from economic analyses.<sup>14</sup> Still, even when viewed in economic terms, the record of recent health, safety, and environmental regulations is stunningly positive. Studies consistently show that the benefits dwarf the costs.

The most authoritative analyses are annual reports that the White House's Office of Management and Budget (OMB) provides to the Congress. Under both president Obama and former president George W. Bush, the OMB has consistently found that the benefits of regulation overwhelmingly outweigh the costs. OMB's 2011 report found that regulations issued between October 1, 2000 and September 30, 2010 resulted in benefits ranging from \$132 billion to \$655 billion, compared to costs ranging from \$44 billion to \$62 billion.<sup>15</sup> In other words, the benefits derived from major regulations have exceeded their costs by a factor of three to eleven—or using an average of the estimates, by a factor of seven. There are few places one can go for a 700% return on investment, but U.S. health, safety, and environmental regulation is one of them.

<sup>12</sup> See ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (Mar. 2011), available at <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

<sup>13</sup> See ENVTL. PROTECTION AGENCY, BLOOD LEAD LEVEL, <http://cfpub.epa.gov/eroe/index.cfm?fuseaction=detail.viewind&lv=list.listbyalpha&r=224030&subtop=208>.

<sup>14</sup> See, e.g., SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 92-120 (2003); FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

<sup>15</sup> OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 13-14, available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf)

Some regulations have performed better still. For example, the EPA has estimated that Clean Air Act regulations have resulted in annual benefits of \$1.3 trillion as of 2010, compared to annual compliance costs of just \$53 billion.<sup>16</sup> This means that for every one dollar spent in compliance costs, the American public realizes over 30 dollars in benefits, much of it in the form of avoided health costs. This ratio is projected to increase, with EPA estimating in April 2011 that by 2020, Clean Air Act regulations will provide \$2 trillion in annual benefits compared to compliance costs of just \$65 billion.<sup>17</sup> Major EPA rules issued during the first two years of the Obama administration produced total annualized benefits of between \$44 billion and \$148 billion with total annualized costs of between just \$6.7 billion and \$12.5 billion.<sup>18</sup>

### C. Regulations can drive innovation.

Debates on regulation often ignore the role that government standards can play in driving innovation, spurring the creation of new products that are safer, more efficient, or both. A recent Public Citizen report<sup>19</sup> identifies five examples of regulation spurring innovation. In each instance, industry fiercely resisted the proposed rule. But when it took effect, industry met the new standard, and in the process developed a better system or product:

- *Increasing Light Bulb Efficiency.* In 2007, The Energy Independence and Security Act (EISA) increased the efficiency standard for traditional incandescent light bulbs. In response, Philips Lighting invented a new halogen incandescent that emits light that is almost indistinguishable from traditional bulbs, is 30 percent more efficient, and lasts three times longer.<sup>20</sup>
- *Removal of CFCs from Aerosol.* After the scientific discovery that chlorofluorocarbons (CFCs) harm the Earth's ozone layer, government agencies implemented a ban on all non-essential CFC aerosol propellants. A day after the EPA officially implemented the regulation, the inventor of the original aerosol announced the invention of a cheaper aerosol propellant that didn't pose a threat to the ozone layer.<sup>21</sup>

<sup>16</sup> See ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (Mar. 2011), available at <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> Isaac Shapiro, *Tallying Up the Impact of New EPA Rules: Combined Costs of Obama EPA Rules Represent a Sliver of the Economy and are Far Outweighed by Cumulative Benefits* (Econ. Pol'y Inst., Briefing Paper No. 311, 2011), available at <http://w3.epi-data.org/temp2011/BriefingPaper311.pdf>.

<sup>19</sup> Negah Mouzoon & Taylor Lincoln, *Regulation: The Unsung Hero in American Innovation*, Public Citizen, Sept 13, 2011, <http://www.citizen.org/documents/regulation-innovation.pdf>

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

- *Removing Vinyl Chloride from the Workplace.* To protect plastic manufacturing workers, OSHA in 1974 banned emissions of the carcinogen vinyl chloride in the manufacturing of polyvinyl chloride (PVC) plastic. Three months later, B.F. Goodrich, the largest PVC manufacturer, invented a new process that shielded workers from vinyl chloride exposure.<sup>22</sup>
- *Reducing of Sulfur Dioxide Emissions.* The Clean Air Act requires coal plants to reduce emissions of sulfur dioxide, a major air pollutant that causes acid rain and smog. Industry responded to the EPA regulations by improving the efficiency of post-combustion sulfur dioxide removal, otherwise known as “scrubbing,” providing massive health benefits at costs far lower than anticipated. A 2003 OMB analysis of emissions reductions of SO<sub>2</sub> and NO<sub>x</sub> (another pollutant) found the ratio of benefits to costs to be more than 40-to-1.<sup>23</sup>
- *Increasing the Efficiency of Home Appliances.* During the energy crisis of the 1970’s, Congress enacted tough efficiency standards for consumer appliances being used in residential and commercial buildings. The standards prompted manufacturers to improve the efficiency of their products. These improvements are projected to save American consumers more than \$240 billion in lower energy bills by 2030.<sup>24</sup>

#### D. Regulations can spur job growth.

Another little-noticed benefit of regulation is that it can spur job growth—the principal type of assistance the U.S. economy needs right now. The main problem in the U.S. economy at present is a lack of consumer demand. Companies are holding record amounts of cash, unwilling to use it for productive purposes because there is too little demand for their goods and services.<sup>25</sup> In this economic situation, regulations that require companies to upgrade or buy new equipment would help boost the economy by requiring companies to spend their idle cash in ways that create demand for goods and services.<sup>26</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Bruce Bartlett, *It's the Aggregate Demand, Stupid*, N.Y. TIMES (Aug. 16, 2011), available at <http://economix.blogs.nytimes.com/2011/08/16/its-the-aggregate-demand-stupid/>; Paul Krugman, *It's Demand, Stupid*, N.Y. TIMES (Sept. 15, 2010), available at <http://krugman.blogs.nytimes.com/2010/09/15/its-demand-stupid/>.

<sup>26</sup> See, e.g., Paul Krugman, *Broken Windows, Ozone, and Jobs*, NY TIMES (Sept. 3, 2011), available at <http://krugman.blogs.nytimes.com/2011/09/03/broken-windows-ozone-and-jobs/> (“[T]ighter ozone regulation would actually have created jobs: it would have forced firms to spend on upgrading or replacing equipment, helping to boost demand. Yes, it would have cost money—but that’s the point! And with corporations sitting on lots of idle cash, the money spent would not, to any significant extent, come at the expense of other investment.”).

Multiple studies have shown that new EPA air pollution standards will lead to increased job growth and investment in the pollution abatement and control sector,<sup>27</sup> with one studying finding that up to 1.5 million jobs will be created by the new EPA rules over the next five years.<sup>28</sup> In short, health, safety, and environmental regulations could help lift the U.S. economy out of the Great Recession.

## II. AN EVALUATION OF REGULATIONS MUST CONSIDER BENEFITS AS WELL AS COSTS.

One frequently mentioned problem regarding our regulatory system is its cost. The principal source of this claim is a study commissioned by the Small Business Administration's Office of Advocacy, which purported to find that the annual costs of significant regulations amount to \$1.75 trillion dollars a year.<sup>29</sup> This study used a deeply flawed methodology and faulty data,<sup>30</sup> and has been discredited by experts and peer reviewers from across the political spectrum. Current OIRA administrator Cass Sunstein has previously stated that the study "should be considered nothing more than an urban legend"<sup>31</sup> while John Graham, OIRA administrator under George W. Bush, has stated that a prior iteration of the study "might not pass OMB information quality guidelines."<sup>32</sup> The Congressional Research Service found severe flaws in the study and noted that its own authors state that it "was not meant to be a decision-making tool for lawmakers or federal regulatory agencies to use in choosing the 'right' level of regulation."<sup>33</sup> Indeed the study

<sup>27</sup> See e.g., Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Econ. Pol'y Inst., Briefing Paper No. 305, 2011) available at [http://epi.3cdn.net/961032cb78e895dfd5\\_k6m6bh42p.pdf](http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf); Richard D. Morgenstern, William A. Pizer, & Jhih-Shyang Shih, *Jobs versus the Environment: An Industry-level Perspective* (Resources for the Future, Discussion Paper 99-01-REV, 2000), available at [http://www.globalurban.org/jobs\\_vs\\_the\\_environment.pdf](http://www.globalurban.org/jobs_vs_the_environment.pdf); James Heinz, Heidi Garrett-Peltier & Ben Zipperer, *New Jobs – Cleaner Air: Employment Effect Under Planned Changes to the EPA's Air Pollution Rules* (Ceres & University of Mass. Political Economy Research Institute, 2011) available at <http://www.ceres.org/resources/reports/new-jobs-cleaner-air>.

<sup>28</sup> Heinz, Garrett-Peltier & Zipperer, *supra* note 27, at 8.

<sup>29</sup> Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (2010) available at <http://www.sba.gov/sites/default/files/rs371tot.pdf>.

<sup>30</sup> John Irons and Andrew Green, *Flaws Call for Rejecting Crain and Crain Model*, Economic Policy Institute Issue Brief #308 (July 19, 2011), available at [http://docs.google.com/viewer?url=http://www.epi.org/page/-/EPI\\_IssueBrief308.pdf&hl=en\\_US&embedded=true](http://docs.google.com/viewer?url=http://www.epi.org/page/-/EPI_IssueBrief308.pdf&hl=en_US&embedded=true).

<sup>31</sup> Mark Drajem, *Rules Study Backed by Republicans 'Deeply Flawed,' Sunstein Says* (BLOOMBERG, June 3, 2011) available at <http://www.bloomberg.com/news/2011-06-03/rules-study-backed-by-republicans-deeply-flawed-sunstein-says.html>.

<sup>32</sup> Hearing on H.R. 2432, 7/22/03, Tr. 21 (statement of John Graham).

<sup>33</sup> CONGRESSIONAL RESEARCH SERVICE, *ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS* (Apr. 6, 2011).

was so poor that when different researchers fixed flaws in the data set and reapplied the original methodology, instead of \$1.75 trillion in economic impact, they found *none*.<sup>34</sup>

Of all the study's flaws, the greatest is that it examined the costs of regulation without considering their benefits. By that methodology, the U.S. should not spend money on national defense or law enforcement, and families should not spend money on food or health care. These things cost a great deal.

### III. THE COSTS OF UNDER-REGULATION CANNOT BE IGNORED.

Finally, an evaluation of the merits of regulation should not ignore the costs of under-regulation. Recent events such as the economic crisis, the BP oil spill, the disaster at Massey Energy's Upper Big Branch mine, and a number of food and product recalls all share one common feature: weak or nonexistent regulations. In each case, the U.S. spent far more money responding to disaster than it would have spent on preventive measures. The most significant of these examples is the current financial crisis. When the financial sector was deregulated, it soon imploded under the weight of its own reckless and predatory practices. This collapse, and the ensuing Great Recession, have cost the U.S. economy 11 million jobs,<sup>35</sup> causing untold misery. There have been other costs as well, such as \$237 billion in bailouts<sup>36</sup> and trillions of dollars in investment losses that have put retirement out of reach for millions of people.<sup>37</sup> The recent faith in Wall Street's ability to police itself cost America—and the world—dearly.

### IV. CONGRESS SHOULD REMOVE BARRIERS TO COMMON-SENSE RULES.

In light of the strong record of regulatory successes in the U.S., and the devastating consequences of poor oversight, it is surprising that U.S. health, safety, and environmental protection agencies are some of the most heavily regulated entities in the country. In the past three decades, federal agencies have been knotted in red tape and burdensome, duplicative requirements, making difficult for them to do their job of protecting the American public.

<sup>34</sup> *Id.* at 2 ("We find that in this more complete data set there is no statistically significant relationship between regulatory quality and GDP.").

<sup>35</sup> Rebecca Thiess, *The Great Recession's Long Tail*, Economic Policy Institute Briefing Paper #294 (Feb 2, 2011), available at <http://www.epi.org/page/-/old/briefingpapers/BriefingPaper294.pdf>.

<sup>36</sup> ProPublica, *The State of the Bailout*, available at <http://projects.propublica.org/bailout/main/summary> (last visited Sept. 12, 2011).

<sup>37</sup> See, e.g., Barbara Butrica, Karen E. Smith, & Eric Toder, *How Will the Stock Market Collapse Affect Retirement Incomes?* 1 (The Urban Institute, Older Americans' Economic Security Report No. 20, 2009), available at [http://www.urban.org/uploadedpdf/411914\\_retirement\\_incomes.pdf](http://www.urban.org/uploadedpdf/411914_retirement_incomes.pdf).



To the relatively simple rules of the 1946 Administrative Procedure Act, the White House has added analytic requirements through multiple executive orders, and Congress has added numerous procedural and analytic requirements in laws such as the Paperwork Reduction Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, and the Unfunded Mandates Reform Act. As a result, rule-writing by a U.S. agency can now involve as many as 110 requirements.<sup>38</sup>

Agency budgets have not kept pace with their statutory missions or the burdens placed on them; instead their budgets have been drastically reduced.<sup>39</sup> The combination of budget shortfalls and burdensome, duplicative requirements has resulted in unacceptably long delays for public safeguards. Even common-sense, noncontroversial rules that would save many lives and injuries can take many years to complete. For example, a 2011 Public Citizen report reviews the creation of OSHA's cranes and derricks rule, which took 10 years to complete even though public interest groups, unions, and construction firms had all agreed on the need for it.<sup>40</sup> While the rule was winding its way through the regulatory process, 220 construction workers lost their lives due to faulty cranes.<sup>41</sup> Unfortunately, lengthy rulemakings are the rule rather than the exception.

When it takes an entire decade to produce a common sense rule that virtually everyone agrees is necessary, the regulatory process is broken. Congress should get to work on reducing the unnecessary burdens placed on the agencies that protect our health and environment.

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<sup>38</sup> Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 536-37 (2000).

<sup>39</sup> See, e.g., Rena Steinzor & Sidney A. Shapiro, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1757-59 (2008).

<sup>40</sup> Taylor Lincoln & Negah Mouzoon, *Cranes & Derricks: OSHA's Prolonged Creation of a Key Public Safety Rule*, Public Citizen, Apr. 14, 2011, <http://www.citizen.org/Page.aspx?pid=4884>.

<sup>41</sup> *Id.* at 4.

Chairman ISSA. Thank you.  
Mr. Barker.

#### STATEMENT OF DAVID BARKER

Mr. BARKER. Mr. Chairman and members of the committee, my name is David Barker. I am a published herpetologist and an entrepreneur engaged in the breeding and sales of pythons and boas. I am grateful for this opportunity to relate some of the problems, legal shortcomings and job-killing aspects of the Interior Department's and the U.S. Fish and Wildlife Service's proposal to add nine species of large snakes to the Injurious Wildlife List under the Lacey Act.

A listing under the Lacey Act makes it a Federal crime to import or export these species, or move them across State lines. And this would be the first time a species in common pet ownership was so listed. The Fish and Wildlife Service has not considered the economic impact of this listing, failing, as the Small Business Administration Office of Advocacy noted, to fulfill its duties under the Regulatory Flexibility Act. The proposed action also constitutes an inappropriate taking of property, impacting as many as a million Americans. Finally, it is based on an insubstantial scientific analysis that has not withstood scrutiny or subsequent review.

Taking that last issue first, the basis for the Fish and Wildlife Service proposed action can be traced back to a paper published in early 2008 concluding that pythons would find the climate of the southern third of the continental United States to be favorable and predicting that these pythons were likely to invade the United States all the way from Washington, DC, to San Francisco.

The two past cold winters have now laid to rest that fear. Pythons and boas will not survive anywhere in the continental United States except extreme Southern Florida. In the past 2 years, there are four published papers that describe how pythons fail to survive in cold weather, and three of those papers are coauthored by government biologists and academics contracted by the Interior Department agencies.

Second, the proposal to invoke the Lacey Act is not a valid use of this Federal criminal statute. The simple truth is that the proposed action, one, will not solve or correct any problem regarding these snake species in South Florida; two, it will destroy American businesses and it will damage hundreds of thousands of people economically; and, three, it threatens as many as a million law-abiding American citizens and their families with the penalty of a felony conviction for pursuing their livelihoods, for pursuing their hobby or for simply moving with their pet to a new State. States should be allowed the freedom to regulate this industry as they see fit, without heavy-handed Federal intervention.

In my own personal circumstance, if the proposed action is implemented, it will directly and negatively affect my wife's and my incorporated small business and our family income. It will destroy more than 20 years of work and it essentially confiscates the value of our investments in breeding stock and equipment, and it removes all value to our colony of breeding animals. It will stop all of our interstate and international business, which is 90 percent of our business; it will immediately reduce our family income by 35

percent or more at a time when income and work come hard. It will likely ruin our retirement and, additionally, our business is interconnected with many other local businesses, large and small, that will be negatively affected.

There are thousands of other families with small snake breeding businesses similar to ours. The Fish and Wildlife Service utterly failed to take any hard look at these economic impacts and they failed to consider reasonable alternatives to Federal regulation that were offered by my industry. As the Office of Advocacy noted, the agency failed to meet its most basic duties under the Regulatory Flexibility Act.

Finally, a little discussed issue regards the disaster that may follow the implementation of this proposed rule. What is going to happen to the million or so animals that suddenly are without value? Many, of course, may be maintained into the future by their current owners, but what will be the outcome for the animals that are suddenly unwanted or unaffordable? The proposed action makes no provision for the disposal of these animals. Zoos will not take even one of them. Animal shelters are completely unprepared and generally without trained staff, equipment, cages, or food. The implementation of the proposed action may precipitate the greatest slaughter of pet animals in American history.

I thank the committee for this opportunity to voice my concerns, and if there are any questions I will do my best to answer them. Thank you.

[The prepared statement of Mr. Barker follows:]

**Statement of David G. Barker**  
**Before the House Committee on Oversight and Government Reform**  
**September 14, 2011**

Thank you very much for this opportunity to testify on the significant adverse impacts on small businesses of the U.S. Fish and Wildlife Service's (FWS) proposal to list nine species of constricting snakes on the Injurious Wildlife List under the Lacey Act.

I am a herpetologist by training and author of numerous books and articles, both for scientific journals and the popular press. I am also the founder, along with my wife, of Vida Preciosa International, Inc., a commercial enterprise that specializes in the research and captive-propagation of pythons and boas. The testimony provided is based on my extensive fieldwork and research over several decades and experience in the reptile industry. Additionally, I am a member of the U.S. Association of Reptile Keepers (USARK), a trade association representing all segments of this industry, including its reptile breeding, retail, transportation, equipment manufacture, trade show promotion, medical supply, herpetological veterinary, and wholesale sectors. USARK has been in the forefront advocating against this proposed rule, working with other groups such as the Pet Industry Joint Advisory Council (PIJAC) and the Association of Zoos and Aquariums (AZA). I will also reference research and information compiled and submitted by USARK during this process.

FWS's proposed regulation lacks a scientific basis, being based on a single flawed study that has not withstood scientific review. More recent research contradict these findings. The rule was also developed without adherence to the Regulatory Flexibility Act (RFA). FWS failed to estimate the rule's costs and economic impacts on the small business community and to explore less burdensome alternatives offered by the industry. For these and other reasons, the proposed listing fails to meet President Obama's announced standards for scientific integrity and data quality, regulatory guidance, and minimization of impacts on small businesses.

Most importantly, this misguided regulation will destroy an entire industry, comprised almost exclusively of small and micro businesses. Its economic impacts, based on past industry growth, will amount to losses of between \$505 million and \$1.2 billion over ten years. Speaking personally, it will criminalize virtually 90 percent of my sales and affect a regulatory taking of my breeding stock and equipment. In short, if this rule goes into effect, it will destroy my life's work and investments for no rational reason.

**The Regulation Lacks a Scientific Basis**

Based on my own and others research, I can confidently state that the FWS proposed listing is utterly lacking in a scientific basis. It has been put forward on a widely discredited study by a U.S. Geological Service (USGS) scientist in 2008 purporting to find that as much as a third of the continental United States could provide suitable habitat for these nine species of pythons, anacondas and boa constrictor. From that, FWS concluded these snakes could become established and pose a danger to native wildlife, justifying the proposed Lacey Act listing.

In point of fact, there have been at least four subsequent studies – three of which were co-authored by government researchers or academic researchers under contract to U.S. Department

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of the Interior agencies – that undermine the USGS study. They all support the incontrovertible fact that these snakes are highly intolerant to the cold, failing to survive in temperatures as high as forty degrees Fahrenheit. The fatal flaw with the USGS study, which was based on “climate matching” – or identifying regions of the world to which these snakes are indigenous to similar climates in the United States – is principally that it relied on mean monthly temperatures. It failed to account for persistent low seasonal temperatures throughout the U.S. that make all areas save for the most southern regions of Florida and Hawaii utterly inhospitable for these animals.

Only two of the nine species listed in the proposed action are thought to have become established. Burmese pythons are believed to be tenuously established in the Everglades region and a small population of boas may be established in a 20 acre glade of trees in a Miami city park. Genetic testing of Burmese pythons from the Everglades region shows that the population was introduced to Florida prior to 1994; the introduction most likely came from the accidental release of captive-bred babies from reptile distributor’s facility by Hurricane Andrew in 1992. Despite the relatively long establishment of these populations, these snakes have not extended their range beyond this narrow band. No attempt has ever been made to eradicate either of these species since they were first discovered.

Furthermore, despite the legitimate concerns over the establishment of these non-native species within the Everglades ecosystem, there has been no empirical evidence that their presence has threatened the ecosystem or caused any serious disruption. In fact, due to the particular harsh winters this year and last, it has been virtually impossible to find any boas or pythons in these areas. Despite intensive search efforts and even an open hunting season on these snakes, very few have been seen in Florida since 2009. Even the popular television show Python Hunters has had to turn its attention to other species and other localities, because pythons have become very scarce in the Everglades. Needless to say, despite decades of pet ownership of boas and pythons, they have not become established anywhere else in this country.

In short, the FWS proposal is a job-killing solution in search of a problem.

#### **This Issue is Appropriately Addressed by the States**

The general admonition to “not make a federal case out of it” applies strongly in this instance. States are well situated to allow, prohibit, or regulate this industry as they see fit. Thus, for instance, the State of Hawaii bans ownership, possession, or importation of any of these snakes. Texas uses a permitting system, controlling access to ownership of many of these snakes. Florida, which has the only established population, has likewise largely banned private ownership. In each instance, the law has been tailored to address important interests identified by these states’ citizens.

It is instructive to note, however, that even Florida does not impose a restriction so sweeping as that proposed by FWS. Florida law allows for the display of such snakes, including allowing private individuals to bring these species into the state under certain controlled circumstances. This exception allows for the continuation of annual reptile trade shows held in the state, such as the major show in Daytona that just recently concluded. These trade shows<sup>1</sup> are economically

<sup>1</sup> There were over 300 reptile trade shows held across the United States last year.

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important both to the industry (in terms of sales of snakes, equipment, supplies, and services) and to the locations that host them.

Florida has struck a balance that protects both its environment and regionally important economic activity in a manner that best suits it. FWS would deny states the right to make such a choice. The agency would also harm businesses in regions in which there is no chance of these constricting snakes to become established—the rule applies equally to Alaska and Florida; to Maine and Hawaii. Given the abundance of peer reviewed science, the virtual non-existent risk in pet ownership, and the current importance of the jobs and economic activity this industry provides for tens, if not hundreds, of thousands of Americans, the Lacey Act rule should be withdrawn.

#### **A Lacey Act Listing of These Snakes Will Devastate an Entire Small Industry**

The modern U.S. reptile industry has grown rapidly over the past two decades. The number of U.S. households that own a reptile rose from 2.8 million to 4.7 million from 1994 to 2008, an increase of 68%. In contrast, the number of households that own any kind of pet increased only 35% over that same period. Today, this sector of the pet industry has become increasingly complex, generating annual revenues approaching \$1.4 billion. The prime movers fueling this growth are small, predominately American businesses.

Many of these businesses began as captive breeding operations run by reptile enthusiasts and hobbyists. Over the years, these businesses have expanded their customer base to include foreign reptile breeders and pet owners.

Of the overall market for reptiles, the component comprising the nine species proposed to be listed is estimated to comprise about 11%, generating over \$100 million a year in economic activity. It is comprised of importers; captive breeding operations such as my own; specialized herpetological veterinarians; rodent breeders and distributors; manufacturers of food pellets, lighting, terrariums, terrarium decorations, heating products, vitamins and supplements, thermostats, snake hooks, sexing tools, and humidity products; specialized transport companies; trade show organizers and promoters; and others. Ninety-nine percent of the affected businesses qualify as small businesses under the Regulatory Flexibility Act (RFA).

Under the proposed rule, a significant portion of this business will be lost. This industry is driven by high-valued snakes specially bred for unique colors, patterns, albinism, and other traits. These so-called “morphs” can fetch hundreds and even thousands of dollars from collectors, both domestically and abroad. At the highest end, prices rise to the tens of thousands of dollars for an animal. If the Lacey Act listing is adopted, this sector will die and thousands of small breeding operations will be left with inventories of snakes and specialized equipment that will be virtually worthless.

Because FWS failed to produce any estimates of the size and value of the industry, much less develop any meaningful measure of the costs and benefits of the regulation, the industry itself bore the cost of producing an economic analysis. A copy of that report, produced by Georgetown Economic Services, will be submitted for the record. The study found that almost 60% of all sales involved interstate commerce. Thus, under the most charitable economic

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assumptions, lost revenue impacts will range from \$42.8 million to \$58.7 million annually. However, given the fact that such interstate sales comprise such a large portion of total revenue, more realistic annual revenue losses range from \$75.6 million to \$103.6 million.

In my own personal circumstance, if the proposed rule is implemented, it will directly and negatively affect my wife's and my incorporated small business and our family income. About 90% of our business is derived from interstate and international sales. This regulation will thus destroy some 20 years of work and essentially confiscate the value of our investments in breeding stock and equipment. Conservatively, our family income will be immediately slashed by 35% at a time when income and work come hard and negatively impact our retirement. Additionally, our business is interconnected with many other local businesses, large and small, that also will suffer economic harm. Nationally, there are thousands of other families with small snake-breeding businesses similar to ours.

FWS utterly failed to take any hard look at these economic impacts and failed to considered reasonable alternatives to federal regulation offered by the industry. This is not just my opinion, but also that of the Small Business Administration's Office of Advocacy. In a strongly-worded comment letter (also submitted for the record), the Acting Chief Counsel for Advocacy, Ms. Susan Walthall, and the Assistant Chief Counsel, Ms. Jamie Belcore Saloom, found that FWS:

1. Failed to "adequately describe the impacts of the proposed rule on small businesses";
2. Did "not discuss significant alternatives to the proposed rule";
3. Did "not properly identify the small entities directly affected by the rule"; and
4. "Underestimates the economic impact on small entities."

They concluded: "Advocacy believes that the proposed rule will have a significant [adverse] economic impact on a substantial number of small entities that has not been fully examined by FWS." By my reading, the Office of Advocacy is politely saying that FWS violated the law.

Advocacy's well-founded conclusions were based not only on a review of the agency's RFA analyses, but a full "round table" discussion with representatives of many sectors of the industry. Unlike FWS, the Office of Advocacy took the time to understand the industry and the impacts this Lacey Act listing would have on our businesses. We would likely not be in this position today if FWS had taken a similar approach.

#### **FWS's Proposed Regulation is Inconsistent the Administration's Regulatory Guidance**

Finally, given that this Committee is also hearing from Mr. Cass Sunstein, head of the Office of Information and Regulatory Affairs (OIRA), it is worth noting that his office has an important role in this particular rulemaking. Not only is OIRA responsible for implementing the President's regulatory policy, but it is currently actively reviewing FWS's proposed listing rule. Indeed, it has been doing so since about April when USARK met with Office of Management and Budget (OMB), FWS, and Interior Department officials.

**Testimony of David G. Barker**  
**September 14, 2011**

**Page 5**

I appreciate that the OMB is taking a hard look at the FWS proposal, assuming it is an indication that the concerns raised by the various associations – USARK, PIJAC, and AZA – are being taken seriously. However, the uncertainty that its prolonged review has caused is virtually the same as having the rule in place. With no final decision, business for me and others have dropped precipitously as buyers are unwilling to make investments or purchase snakes whose transportation may be criminalized. We hope that OMB and OIRA will reject the proposed rule as inconsistent with Administration policy and the law, and do so now.

There are good reasons for this outcome. Submitted for the record is a copy of a letter USARK sent to Mr. Sunstein detailing the ways in which FWS failed to adhere to the procedural and substantive requirements of, for example, President Obama's January 18, 2011, Memorandum relating to small businesses and job creation, Executive Order 13563 reaffirming the general principles of regulatory philosophy and review, and the President's recently announced standards for scientific integrity.

With respect to scientific integrity, I note that I assisted in filing a detailed challenge to the USGS study under the Information Quality Act (IQA). Both the initial challenge and the industry's appeal were completely rebuffed by FWS and the Interior Department. Unfortunately, the IQA lacks teeth, providing business with no recourse when meritorious challenges to poor science underlying rules with major impacts are summarily rejected by federal agencies. I would ask Congress to consider strengthening the IQA.

#### **Concluding Thoughts**

A little discussed issue regards the disaster that may follow the implementation of the proposed action. What will happen to the million animals that are suddenly without value? Many, of course, may be maintained into the future as pets by their current owners. But what will be the outcome for animals that suddenly are unwanted or unaffordable? Some of the larger snakes can live in excess of 30 years. The proposed action makes no provision for the disposal of the animals. Zoos will not take even one. Animal shelters are completely unprepared and generally without trained staff, equipment, cages, or food. The implementation of the proposed action may precipitate the greatest slaughter of pet animals in American history.

Finally, I, like many others who are passionate about snakes and reptiles and who have made this their life's work, spend a large amount of time in educational activities and providing other public services. We introduce students to these magnificent creatures, assist zoos and aquariums in care, maintenance, and supply, aid conservation efforts, and publish articles, both for the scientific community and the general public. If this rule is adopted, all these valuable services will be lost, along with American jobs and the American dream for thousands of people. These "costs" – both human and monetary – are not offset one iota by this misguided rule that utterly lacks a single benefit. With this rule, we will be a poorer nation in all senses.

I thank you very much for this opportunity to testify on this very important matter. If there is any further information that would assist the Committee in its work, I will do my very best to provide it.



Chairman ISSA. Thank you.  
Mr. Palmer.

#### STATEMENT OF MATHEW PALMER

Mr. PALMER. Good morning, Mr. Chairman. Thank you for inviting me to testify. My name is Mathew Palmer and I am a proud Delta flight attendant. I began my career with Delta in 2008 and have been based both in New York City and Atlanta. I have had the privilege of visiting five continents and seeing more than 20 countries. I have carried celebrities, common folks, and even shared jet service to D.C. with President Jimmy Carter in route to President Obama's inauguration.

A number of my colleagues, other Delta flight attendants both pre-merger Northwest and Delta alike, are here with me who have, like me, been harmed by government regulation. Combined, all of us have hundreds of years of experience as Delta flight attendants.

My colleagues at Delta Airlines have three times in the past decade been involved in representational elections. Each time the Association of Flight Attendants were seekened to bargain on our behalf. AFA has failed each time to secure the votes of confidence needed to step into that role.

The first two of these elections were conducted according to the 75 year old former rules of the National Mediation Board and the Railway Labor Act, rules supported by both Republican and Democratic administrations. That leads to my main concern. A new rule arranged by union insiders and pushed through by the NMB has changed the election landscape despite strong objections from both airlines and, more importantly, from thousands of employees who do not want forced union representation.

When the NMB changed the election procedures to enable unions to be certified with a minority of a workgroup, there was no change to the archaic decertification process, which is convoluted at best and requires a "straw man" posing as a union to win an election. In fact, decertification has never been successfully used in a large employee group in the airline and railroad industries.

When Delta and Northwest were merging into the world's largest airline, all signs indicated that the world's largest flight attendant union, the AFA, was in backdoor dealings with Board Members Linda Puchala and Harry Hoglander, both of whom previously served as AFL-CIO Union officials with the AFA and Airline Pilots Association, respectively. The Transportation Trades Department of the AFL-CIO during this time secretly petitioned the NMB for a change in the voting rule to organize a union.

This was not disclosed to the pre-merger Delta flight attendants, who it was intended to affect and, more shocking, not to the pre-merger Northwest flight attendants, who actually represented them by the AFA, despite the fact that AFA President Patricia Friend served as Secretary of the Transportation Trades Department herself. Call me foolish, but I believe she should effectively communicate this to her members. Patricia Friend did not.

So even with the rules tilted in the favor of the unions, in the most recent election, 94 percent of Delta flight attendants turned out to vote and the majority voted to reject AFA representation once again. Following, the AFA then had the gall to say that the

high turnout rate indicated Delta interfered in the election. The argument apparently was that too many people voted. Now the same two members who discarded 75 years of precedent are considering requests from the unions to now disregard how we voted and now force us to redo elections under rules that are even more favorable to unions.

Mr. Chairman, I want the NMB to respect our vote. I want them to respect the votes of the majority of Delta flight attendants and Delta employees and other workgroups who prefer to have a direct relationship with our company. I believe the majority of my co-workers agree with me that workers should make decisions about their representation and a government agency such as the NMB should not impose its judgment on employees. Rather, they should be a neutral referee of elections.

We have been held hostage by the NMB and the union for 3 years since our merger. Our pre-merger employee group, some of which are here today, are forced to be kept separate so we are not able to get the full benefits of our merger. I cannot speak for Delta Airlines and I will not pretend to. In fact, despite my testimony echoing that of many of my colleagues at Delta, what I have said is only my reality.

Frankly, I don't care whether one is pro-union or not. What I am concerned about is the fact of my pay, my work rules, my stock, my livelihood, my friends, my colleagues, and our system of government are all being affected by the partisanship of this board working to do the bidding of unions whose elections are supposed to be neutral. They are biased and they should not be. All should agree it is time they be reined in.

I would like to thank the committee for their time.

[The prepared statement of Mr. Palmer follows:]

My name is Mathew Palmer and I am a proud Delta Flight Attendant. I began my career with Delta in 2008 and have been based both in New York City and Atlanta. I have had the privilege of visiting five continents and seeing more than 20 countries. I've carried celebrities, common-folk and even shared jet-service to D.C. with President Jimmy Carter en route to President Barack Obama's Inauguration.

A number of other Delta flight attendants who support my views are here with me. Combined we have hundreds of years of experience as Delta flight attendants.

As you may be aware, my colleagues at Delta Air Lines have three times in the past decade been involved in representation elections, each time the Association of Flight Attendants seeking to bargain on their behalf. Each time, AFA has failed to secure the votes of confidence needed to step into that role.

In each of those elections, the Association of Flight Attendants petitioned the National Mediation Board to call for an election among Delta Flight Attendants. The first two elections, of course, were prior to the merger with our friends and colleagues at Northwest Airlines. In addition, these elections – held just a few years apart – were conducted according to the longstanding former rules of the National Mediation Board and the Railway Labor Act, which had been in existence for more than 75 years.

I was not qualified by the National Mediation Board to vote in the 2008 election because my training had not ended in time to have me online as the election was being held. For the record, I would not have voted in favor of the Association of Flight Attendants or any other union for that matter. First, I would have no need since the rules of voting were simple: since I did not want a union, I'd simply not cast a vote. Second, and most importantly, I believe the AFA would harm rather than help Delta flight attendants, judging by the AFA's record at airlines across the country, with flight attendants at those airlines always being very unhappy, and by the fact that one of their top priorities is to negotiate mandatory union dues.

It is my opinion – and logical if I do say so myself – that the burden of union representation should be on those that seek such. After all, a union is only as strong as those who comprise the association. It's only smart that a majority be in support of one another, especially when it comes to bargaining for pay, work rules, benefits and the like. It is also my opinion – and again logical – that only a majority should decide union representation for a work group. Only a fool would attempt negotiations with a minority.

But, that is exactly what has happened with the National Mediation Board. Following the second loss at Delta, the Association of Flight Attendants was able to cash in a found lottery ticket following the merger with Northwest Airlines. Because the Union represented their workgroup, which equaled just about 35-percent of the newly joined group, another election could be held, but only if and when the union asked. That's right - under the current rules, only the union could decide whether

and when to call for an election. Union-free Delta flight attendants have no voice in that decision.

The AFA held us hostage for more than eight months, to assure that new, union-friendly appointees were a majority of the NMB before finally filing for an election that would allow Delta flight attendants to have a voice in the representation process. But as noted below, the NMB and the AFA have now continued to hold us hostage for almost three years since our merger with Northwest. And the end of the process still is not in sight.

I have prior – albeit brief – experience at airlines represented by the Association of Flight Attendants. Besides that, I have hours of horror stories about this union from friends at practically every airline with AFA representation. Those reasons combined led me to form my opinion that the open and direct relationship Delta Air Lines has with its employees was best for my career. Thousands of my co-workers – the majority – feel the same way.

That leads to my main concern with the rule change arranged by Union insiders and pushed through by the National Mediation Board. Despite both Republican and Democratic Administrations conceding there was no need to change the voting procedures under the RLA for 75 years, this current Board drastically changed the election landscape over strong objections from carriers and, more important, from thousands of employees who do not want forced union representation. They changed the election procedures to enable unions to be certified with minority support, but there was no change to the archaic decertification process, which is convoluted at best and requires a “straw man” posing as a union to win an election. In fact, it has never been successfully used in a large group in the airline and railroad industries.

Under the NMB’s rules, the only way to even attempt decertification is for a *majority* of employees to submit individual cards each naming an identical “straw man” to enter into an election to *replace* the union. If the straw man is somehow elected to become the new union, the only way for the workgroup to become union-free is for the straw man to voluntarily step down, although there is no legal obligation to do so. Under this process it has proven impossible for a group of any more than a few hundred to eliminate union representation.

One rationale advanced by the NMB and unions for not having a straightforward decertification process was stability: The NMB set a higher bar to certify a union than exists under the National Labor Relations Act and determined that there should be a higher bar to eliminate union representation as well.

Now, with two members of the NMB having chosen to abandon the traditional standard for certifying a union, the rationale advanced by the NMB and the unions for making decertification virtually impossible has lost whatever logic it ever had. It shows a bias in favor of union representation from an agency that is supposed to be neutral and honor the preferences of employees.

Thus should a union win an election with minority support and then underperform, there is no viable process to return to union-free status. Employees would certainly suffer with an inept union... the company would most likely bleed financially and the traveling public is without a doubt going to be a victim. None of this seems to matter yet it should be the priority among a truly neutral Board when deciding on election procedures.

Shortly after moving to New York City – a dream, equal to that of working for Delta Air Lines – I noticed a message board on Facebook, titled “No Way AFA.” An acquaintance had posted a message to which I responded. Some time later – a few days or even a week perhaps – Ashton Therrell, an Atlanta-based Flight Attendant with more than 20 years of service contacted me about being a part of the grassroots group.

Along with Ashton and others, we sought not only to seek information about the union but election procedures and the pros and cons of unionization. Behind closed doors, we had many debates and plenty that I must admit still end with people agreeing to disagree. One that we do not waiver on, however, is the farce that has become the National Mediation Board.

When Delta and Northwest were merging into the World’s Largest Airline, all signs indicate that the World’s Largest Flight Attendant Union – the AFA – was in backdoor dealings with Board Members Linda Puchala and Harry Hoglander. Then AFA-President Patricia Friend served as Secretary at the Transportation Trades Department of the AFL-CIO. Although her Union – the AFA – had filed for an election at our newly merged airline, the Transportation Trades Department of the AFL-CIO secretly petitioned the National Mediation Board for a change in the voting rule to organize a union. A copy of the private letter from the Transportation Trades Department to the NMB members is attached. (Attachment 1)

Not only was this contrary to a similar request that the NMB (including Member Hoglander) unanimously rejected just a year earlier, it was not even disclosed to the Delta flight attendants who it was intended to affect – including the pre-merger Northwest flight attendants who were represented by the AFA. Call me foolish, but I would believe that a President should not only know what is going on within her Union but should also effectively communicate this to her members. Patricia Friend did not.

In addition to being private, the AFL-CIO letter isn’t accurate. It is important to note it is not accurate to claim that the NMB’s rule change made elections under the Railway Labor Act consistent with how elections are conducted for political offices, for several reasons. First, political office holders are elected for fixed terms, typically two, four or six years, following which they must stand for re-election. Under the NMB’s rules, unions are elected for indefinite terms, so that they may never need to stand for re-election and new members of the workgroup may never have a say in their representation. Second, as noted, under the Railway Labor Act the NMB has made it virtually impossible for employees to trigger a vote to return to

union-free status. In contrast, under the National Labor Relations Act employees who become dissatisfied can use an equal process to trigger a decertification election as they used to elect the union. And of course it is as easy to vote political office holders out of office as it is to elect them. Third, elections under NMB rules typically last from four to six weeks, and employees are able to vote from home or any other location by a toll-free telephone number or the internet. These differences, in addition to the need for labor stability, have been cited by the NMB in the past as reasons why a union should demonstrate majority support in order to be elected.

Over the past 75 years, the NMB also has said it is important to demonstrate majority support for a union under the Railway Labor Act because of the need to assure support for negotiated solutions and to avoid shutdowns in the vital air and rail transportation industries.

Even though the AFA had finally filed for an election eight months after our merger, the AFA mysteriously rescinded their application for a Delta-Northwest Representation Election four months later, at exactly the same time the National Mediation Board announced they intended to make the rule change. This also coincided with the International Association of Machinists rescinding their application for a Delta-Northwest Election among Airport Customer Service representatives. This was a mockery of not only our government which supposedly was impartial in union elections but also to each and every employee affected by these elections, whether pro or anti-union.

So, to be clear, both AFA and the IAM had filed with the NMB for elections in July and August 2010, just after the two appointments to the NMB by the new administration were confirmed by the Senate. AFA had made it clear they would not file for elections until both Members Hoglander and Puchala were confirmed. Then suddenly, on September 2<sup>nd</sup>, 2010, the AFL-CIO requests a voting rule change making it easier to unionize and within days, if not hours of the formal rule change proposal being made public on November 3<sup>rd</sup>, 2010, both unions withdraw their requests to the NMB for elections. AFA even went so far as to tell their members why they were withdrawing their request for an election – because they wanted to vote under the changed rules. A copy of the AFA's explanation of the withdrawal of their election application is attached. (Attachment 2)

As you may be aware, two of the members of the National Mediation Board are former union officials themselves: Linda Puchala once served with the Association of Flight Attendants and Harry Hoglander with the Air Line Pilots Association. It was their decision, as a two-person majority of the three-member board, to completely alter the landscape of union elections at railroads and airlines across the country; as then-Chairman Elizabeth Dougherty wrote in objection to their decision, she was excluded from their shenanigans. (A copy of Ms. Dougherty's letter setting out what occurred is attached, Attachment 3.) But, Congressmen and women, she

wasn't the only one. We, as employees and those affected the most, were also excluded.

In what must have been one of the biggest wastes of time and taxpayer money, the Board – and by Board I mean now-Chairman Puchala and Member Hoglander – pushed through what they called an “open meeting” – not a hearing – on the proposed rule change. This was another charade as people at the AFA and the IAM were whispering that the rule change was a done deal: The two both intended to support the unions' political agenda and change forever the balanced process that had worked well for 75 years. By the way, under the old rules unions were already winning about two-thirds of all elections.

Nonetheless, a limited amount of railroad and airline employees packed a small room to hear pre-screened statements. Perhaps Mr. Hoglander was bored because during this meeting he appeared to be sleeping.

At Delta Air Lines, we have not slept, Congressmen and women. In fact, there have been many sleepless nights not knowing how our careers will be shaped. Personally, I once had bright, wide eyes for an airline and career I'd always wanted but along with others, I've been quickly made to feel like a pawn in a political fight that seems to never end.

Because even with the rules tilted in favor of the unions – and even though the NMB never publicized the new rules to employees until immediately before the voting started – the unions were stunned to learn that 94% of Delta flight attendants turned out to vote and that the majority voted to reject AFA representation once again. The AFA had the gall to say that the high turnout rate indicated Delta interfered in the election. And now the same two NMB Members who orchestrated the rule change are considering requests from the AFA and the IAM to disregard how the employees voted and to re-do the elections under rules even more favorable to the unions. It's as if we've simply been taking off then circling... basically being held hostage by union posturing while a Board with no oversight returns favors to the unions.

Speaking of no oversight, under current law the courts have virtually no authority to review representation decisions by the NMB, even if the NMB is biased or inconsistent. The NMB has many ways to put its thumb on the scale in order to help achieve outcomes that two of its three appointed members favor. For example, it can overturn elections in which employees rejected union representation and re-run the elections under “remedies” designed to favor a decision to have union representation.

This means that the NMB is not subject to a system of checks and balances. It is a situation unique among regulatory agencies, particularly in an area such as labor relations where politically oriented decisions can cause harm to employees and can cost jobs. In addition, the NMB typically does not allow open hearings and the evidence on which the NMB bases its decisions usually is not made public.

It should be agreed by all that no federal agency ought to be beyond the system of checks and balances that applies to all other agencies.

I want the NMB to respect the votes of the majority of Delta flight attendants and Delta employees in other workgroups who prefer not to have AFA or IAM representation. From everything I have observed, two of the three current NMB members believe that Delta employees should have AFA or IAM representation and they are doing all they can to achieve that result. They believe that employees are not smart enough to make up their own mind.

I believe the majority of my co-workers agree with me that a government agency such as the NMB should not impose its judgment on employees. Rather, they should be a neutral referee of elections and restore the balance that has existed for 75 years - until they came into power.

It is simply tragic that while we have been held hostage by the NMB and the unions for three years since our merger in 2008, our pre-merger employee groups are forced to be kept separate so we are not able to get the full benefits of our merger.

I cannot speak for Delta Air Lines and will not pretend to. In fact, despite my testimony echoing that of many of my colleagues at Delta, what I have said is only my reality. Frankly, I don't care whether one is pro union or not. What I am concerned about, is the fact that my pay... my work rules... my stock... my livelihood... my friends... my family... my co-workers and our system of government are all being affected by the partisanship of this Board working to do the bidding of the Unions for whose elections they're supposed to be a neutral referee. They're biased... and they should not be. It is beyond time that they are reigned in and the Unions they've served instead of regulated be warned: no more.

This is a government of the people, for the people, not the unions.



For Immediate Release: November 3, 2009  
 Contact: Corey Caldwell 202-434-0586

## **AFA-CWA Applauds National Mediation Board For Proposed Voting Procedure Change**

### ***Single Certification Application Withdrawn for Delta/Northwest Flight Attendant Election***

Washington, DC - The Association of Flight Attendants-CWA (AFA-CWA) today withdrew the single transportation certification application it filed with the National Mediation Board (NMB) in July on behalf of flight attendants at Northwest Airlines and Delta Air Lines. The withdrawal is in response to the NMB's recent proposed voting procedures announcement that would permit a majority of workers who actually vote in union elections to decide the election and stop assigning "no" votes to workers who do not participate.

"Now that the NMB has announced that, for the first time in recent years, airline employees seeking union representation will have a chance for truly fair elections, flight attendants at Northwest and Delta are excited for that opportunity," said Patricia Friend, AFA-CWA International President. "As the largest private sector union election this year, we want this election at Delta Air Lines to occur under the new democratic procedures and therefore are withdrawing our single transportation application."

If AFA-CWA did not withdraw the petition, it is likely that the Delta flight attendants would be voting during the NMB's 60-day comment period with the ballot count taking place just weeks, if not days, before the final balloting rule is implemented. Since the NMB had yet to respond to AFA-CWA's initial application, an election for the flight attendants had not been scheduled.

"Employees seeking union representation will now have the opportunity to have their voice heard and their votes counted. We have a responsibility to withdraw our application to not only protect the Northwest flight attendant contract, but also to ensure that Delta flight attendants have the opportunity to vote for AFA-CWA representation in the most democratic of ways," added Friend.

*For over 60 years, the Association of Flight Attendants has been serving as the voice for flight attendants in the workplace, in the aviation industry, in the media and on Capitol Hill. More than 50,000 flight attendants at 20 airlines come together to form AFA-CWA, the world's largest flight attendant union. AFA is part of the 700,000-member strong Communications Workers of America (CWA), AFL-CIO. Visit us at [www.afanet.org](http://www.afanet.org).*



NATIONAL MEDIATION BOARD  
WASHINGTON, D.C. 20572

November 2, 2009

OFFICE OF THE CHAIRMAN  
(202) 692-6000

The Honorable Mitch McConnell  
United States Senate  
Washington, D.C. 20510

The Honorable Johnny Isakson  
United States Senate  
Washington, D.C. 20510

The Honorable Pat Roberts  
United States Senate  
Washington, D.C. 20510

The Honorable Tom Coburn  
United States Senate  
Washington, D.C. 20510

The Honorable Judd Gregg  
United States Senate  
Washington, D.C. 20510

The Honorable Michael Enzi  
United States Senate  
Washington, D.C. 20510

The Honorable Orin Hatch  
United States Senate  
Washington, D.C. 20510

The Honorable Lamar Alexander  
United States Senate  
Washington, D.C. 20510

The Honorable Richard Burr  
United States Senate  
Washington, D.C. 20510

Dear Senators:

Thank you for your letter of October 8, 2009 regarding a request from the Transportation Trades Department of the AFL-CIO (TTD) that the National Mediation Board (NMB or Board) alter its voting procedures. I share your concern about the TTD request, and I believe the only proper course of action should have been for the Board to have full comment on the TTD request – together with related issues such as decertification procedures, Excelsior list, and others – before making any proposals. A majority of the Board has chosen instead to propose to change our election rules in the manner requested by the TTD. The proposed rule is available for public inspection today at the Federal Register. I have dissented from this proposal, and the substantive reasons for my disagreement are discussed in my dissent.

In addition to my substantive concerns, I dissented because I believe the process by which the proposed rule was drafted and issued was flawed. The proposal was completed without my input or participation, and I was excluded from any discussions regarding the timing of the proposed rule. As I do not believe the Board should be making this proposal without first hearing comment on all related issues (including decertification), it was not a surprise that I was not included in the initial crafting of the proposed rule. However, I should have, at a minimum, (1) been given drafts along the way for consideration and comment; (2) been included in discussions regarding the timing of the proposal; and (3) been given ample time to review a draft and prepare a dissent if necessary. Instead, on Wednesday, October 28 at 11 am, my colleagues informed me that they had prepared a "final" version of the proposed rule and

intended to send it to the Federal Register that day. They initially told me I had one and a half hours to consider their proposed rule. They also told me that I would not be permitted to publish a dissent in the Federal Register and would have to air any disagreement some other way. Publication of my dissent is not prohibited by any agency policy, and their decision to forbid it in this particular case was arbitrary and ad hoc. After several requests from me, they agreed to give me an additional twenty-four hours -- until noon on Thursday, October 29 -- to review and determine my position on the rule. They continued to insist that I would not be permitted to publish my dissent. The next day, an hour and a half before my "deadline," I informed my colleagues that I intended to dissent and again asked for more time to digest the rule and draft my dissent. My request for more time was rejected. I was then told I would be permitted to publish my dissent, but only if I could have it completed by the noon deadline -- an hour and a half from the time of the conversation. The dissent I originally submitted included a discussion of these process flaws as one of the reasons for my dissent. I was told by my colleagues that if I did not remove the discussion of the process flaws from my dissent, they would not consent to its publication in the Federal Register. I have attached to this letter the full dissent I originally submitted.

Under normal circumstances, I would have preferred not to discuss Board process so publicly. However, in light of the complete absence of any principled process or consideration of my role as an equal Member of the Board, I feel compelled to bring these issues to your attention. I am also troubled by my colleagues' attempt to prevent me from raising these concerns as a part of my published dissent.

This sort of exclusionary behavior is not the way the Board has conducted itself previously during my tenure. In my past experience, Board Members who wished to dissent from a proposed decision have been given a role in the substantive and procedural discussions related to the decision and ample time to prepare their dissent. I believe this is the better way to conduct agency business.

I also query -- why the rush to publish the proposed rule? The election rule in question has been in place for 75 years; why not wait one more day in the interest of ensuring a fair rulemaking process and accommodating the reasonable request of a colleague. Such an obvious rush to put out a proposed rule gives the impression that the Board has prejudged this issue, and it will contribute to the growing perception that the majority is attempting to push through a controversial election rule change to influence the outcome of several very large and important representation cases currently pending at the Board.

Thank you for your interest in this matter.

Sincerely



Elizabeth Dougherty

Chairman ISSA. Thank you.

Thank you all for your statements and a near record that everybody was right there at or below the 5-minutes, which helps all of us. And I would caution all of my colleagues we will do the same on our questions. With that, I will now entertain a document, unanimous consent, if you are ready.

Mr. CUMMINGS. I will just submit it.

Chairman ISSA. Oh, you will. Okay. Well, then I will submit during my opening statement. I ask unanimous consent that the Committee on Oversight's staff report prepared for this hearing be accepted. Without objection.

Additionally, I am submitting for unanimous consent letters in support of the GIPSA position. Without objection, so ordered.

[The information referred to follows:]

**U.S. House of Representatives**  
**Committee on Oversight and Government Reform**  
Darrell Issa (CA-49), Chairman



**Broken Government: How the Administrative State has  
Broken President Obama's Promise of Regulatory Reform**

STAFF REPORT  
U.S. HOUSE OF REPRESENTATIVES  
112<sup>TH</sup> CONGRESS  
SEPTEMBER 14, 2011

### EXECUTIVE SUMMARY

In the wake of stagnant job creation, an unacceptably high unemployment rate and growing concern that our country is marching towards another recession, the House Committee on Oversight and Government is continuing its examination of regulations that are acting as impediments to job creation. Late last year, the Committee began the most expansive look in more than a decade at the impact that regulations were having on businesses – large and small – the result was input from more than 1,300 businesses and their representatives across the country.

The federal government plays a significant role in determining the environment in which job creators must navigate. Unfortunately, the Committee has found that the Obama Administration has created a regulatory environment that is suffocating America's entrepreneurs' ability to create jobs and grow businesses. The result has been a regulatory tsunami that has stifled productivity, wages, job creation and economic growth. This regulatory tsunami has caused job creators to lock down at a time when we need them to expand. The Committee has found that the problems created by this regulatory tsunami goes far beyond the cost of the regulations themselves, but also include breakdowns in the regulatory process itself that is having a severe impact on large and small businesses alike.

The report makes the following key findings:

- The Obama Administration has created a regulatory environment that is suffocating the ability of America's entrepreneurs to create jobs and grow businesses.
- The Obama Administration has presided over a regulatory expansion that has been negligent of its economic impact.
- There are 219 economically significant regulations in the pipeline, which if finalized, will impose costs of \$100 million or more annually on the economy - that's a minimum of \$219 billion over ten years.
- In total, the Obama Administration has imposed 75 new major regulations costing more than \$380 billion over ten years.
- The regulatory process is broken, being manipulated and exploited in an effort to reward allies of the Obama Administration such as environmental groups, trial lawyers, and unions.
- The federal agency charged with serving as a watchdog over the regulatory process has failed to take meaningful action to address the breakdown in the regulatory development and implementation process.
- The Obama Administration has been a willing accomplice in the strategy advanced by outside interest groups to circumvent the oversight and accountability checks in the regulatory process. Essentially, regulatory agencies are avoiding meaningful scrutiny by employing numerous gimmicks by:

- Refusing to perform accurate cost-benefit analysis
- Overturning decades of precedent without justification
- Entering into sue and settle agreements
- Enacting policy changes through guidance documents
- Improperly issuing emergency rulemakings

➤ Examples Include:

- The “sue-and-settle” approach taken by the EPA bypasses the proper rulemaking process and avoids basic principles of transparency and accountability. The removal of the opt-out provision in the EPA lead paint rule is a blatant example and has dire consequences for job creators.
- The Obama Administration is abusing the emergency rulemaking process by issuing “interim final rules.” In the case of the President’s signature health care act, the Patient Protection and Affordable Care Act, vague definitions and lack of clarity are causing health plans to lose their grandfathered status and creating uncertainty for job creators.
- Under the Obama Administration, guidance documents are being used to effect policy changes—which job creators view as having equal weight to regulations themselves. OIRA claims to review “significant guidance documents” but because these documents are not technically regulations, it is unclear what criteria OIRA is using.
- An “enhanced review process” initiated by EPA of Clean Water Act Section 404 permits were initiated in violation of the Administrative Procedures Act.
- The U.S. Department of Agriculture Grain Inspection, Packers, and Stockyards Administration (GIPSA) failed to conduct a proper economic analysis as required by Executive Order on a proposed rule projected to have a \$1.64 billion impact on the beef, poultry and related sectors.
- The SEC used a failed administrative process and neglected to consider the expected costs of the rule instituted as a result of Dodd-Frank. A subsequent D.C. Circuit Court ruling found that, “[SEC] inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commentators.” The court determined that “by ducking serious evaluation of [these] costs the SEC acted arbitrarily.”

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## I. INTRODUCTION

In January 2011, President Obama issued Executive Order 13563, *Improving Regulation and Regulatory Review*,<sup>1</sup> in an effort to review federal rules that “stifle job creation and make our economy less competitive.”<sup>2</sup> He indicated that future regulations should promote public health and welfare, but also “promot[e] economic growth.”<sup>3</sup> Similar rhetoric has continued in recent months, and the Obama Administration has pushed back against claims that businesses are facing a “regulatory tsunami.”<sup>4</sup> Yet, contrary to the Administration’s claims, the federal regulatory state continues to grow rapidly. The number of pages in the Federal Register is at an all-time high.<sup>5</sup> Pages devoted to final rules rose by 20 percent between 2009 and 2010, and proposed rules have increased from 2,044 in 2009 to 2,439 in 2010.<sup>6</sup> Further, of the 4,257 regulatory actions in the pipeline, 219 are considered economically significant, meaning they are estimated to impose a cost of \$100 million or more on the economy.<sup>7</sup> By comparison, that is 28 more than this time last year, and 47 more than in 2009.<sup>8</sup> In total, the Obama Administration has imposed 75 new major regulations costing over \$38 billion annually.<sup>9</sup> According to a report by the Heritage Foundation, “no other President has burdened businesses and individuals with a higher number and larger cost of regulations in a comparable time period.”<sup>10</sup>

In addition, federal regulatory agency budgets are on the rise. Regulatory agencies have seen their budgets grow by 16 percent over the past three years.<sup>11</sup> *Investor’s Business Daily* summarized it well when they reported that “[i]f the federal government’s regulatory operation were a business, it would be one of the 50 biggest in the country in terms of revenues, and the third-largest in terms of employees, with more people working for it than McDonald’s, Ford, Disney and Boeing combined.”<sup>12</sup> As evidence, employment at regulatory agencies has climbed 13 percent since President Obama took office,<sup>13</sup> and the number of staff working on regulatory matters is on schedule to increase at a rate of 10,000 new regulatory employees per year in 2011 and 2012.<sup>14</sup> The number of full time regulatory employees is expected to reach an all-time high of 291,676 in 2012.<sup>15</sup> Meanwhile, since President Obama took office, private sector jobs have declined by 5.6 percent.<sup>16</sup>

<sup>1</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>2</sup> Barack Obama, *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011.

<sup>3</sup> *Id.*

<sup>4</sup> Cass Sunstein, *The Smart Approach to Reforming Regulations*, WASH. POST, June 30, 2011.

<sup>5</sup> Clyde Wayne Crews, Jr., Competitive Enterprise Institute, *Ten Thousand Commandments 2011: An Annual Snapshot of the Federal Regulatory State* (2011).

<sup>6</sup> *Id.*

<sup>7</sup> Susan E. Dudley, *Don’t Overstate Reg Re-examination*, POLITICO, Aug. 24, 2011.

<sup>8</sup> *Id.*

<sup>9</sup> James Gattuso & Diane Katz, Heritage Found., *Red Tape Rising: A 2011 Mid-Year Report* (2011).

<sup>10</sup> *Id.*

<sup>11</sup> John Merline, *Regulation Business, Jobs Booming Under Obama*, INVESTOR’S BUS. DAILY, Aug. 15, 2011.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Geo. Wash. Center for Reg. Stud. and Wash. University’s Weidenbaum Center on the Economy, Govt. and Public Policy, *Fiscal Stalemate Reflected in Regulators’ Budget: An Analysis of the U.S. Budget for Fiscal Years 2011 and 2012* (2011).

<sup>15</sup> *Id.*

<sup>16</sup> John Merline, *Regulation Business, Jobs Booming Under Obama*, INVESTOR’S BUS. DAILY, Aug. 15, 2011.

At a time when unemployment is hovering at 9.1 percent, these regulatory statistics create uncertainty and hinder job creation. Indeed, Cass Sunstein, President Obama's chief regulatory czar and the Administrator of the Office of Information and Regulatory Affairs (OIRA), articulated in a 2002 law review article that "expensive regulation may well increase prices, reduce wages, and increase unemployment (and hence poverty)."<sup>17</sup> A decade later, the problem persists, and paints a picture of an ever-expanding, ever-encroaching regulatory culture. "[U]nreasonable government regulations" ranks as a top ten problem for small businesses, and 21 percent of these business owners identified government regulation as a critical problem blocking job creation.<sup>18</sup> While small businesses create two-thirds of the net new jobs in this country, those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007.<sup>19</sup> This trend appears likely to continue as small businesses continue to be hesitant to hire.<sup>20</sup> Indeed, a recent Small Business Outlook Survey by the U.S. Chamber of Commerce showed that 70 percent of respondents said they do not plan to hire new employees next year, and nine percent will continue layoffs.

Against this backdrop, Administrator Sunstein recently declared that "with the introduction of the President's Executive Order, we now have the tools needed to maintain a smart and efficient regulatory framework" both for "the flow of new regulations and the stock of existing regulations."<sup>21</sup> Further, the President appears to believe that "if regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action."<sup>22</sup> However, federal regulators are not adhering to the President's belief. This report highlights breakdowns in our regulatory system that thwarts the Administration's promises and has significant impact on economic growth and job creation.

Pursuant to President Obama's recent regulatory Executive Order and Executive Order 12866, executive branch agencies are to abide by a host of regulatory principles and perform a variety of analyses. OIRA, an agency within the Executive Office of the President, is to review draft proposed and final regulations and police these agencies to ensure they are meeting their regulatory requirements.<sup>23</sup> If OIRA believes an agency has failed to do so, it can question the agencies analyses or issue a "return letter." A "return letter" to an agency indicates that OIRA thinks the rule would benefit from further consideration and review by the agency.<sup>24</sup> Under the

<sup>17</sup> Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

<sup>18</sup> National Federation of Independent Business, Government and Regulatory Reform, available at <http://www.nfib.com/issues-elections/government-and-regulatory-reform> (last visited Sept. 7, 2011).

<sup>19</sup> *Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy: Hearing Before the Subcomm. On Environment and the Economy of the H. Comm. On Energy and Commerce* 112th Cong. (2011) (statement of Karen R. Harned, Executive Director, National Federation of Independent Business).

<sup>20</sup> U.S. Chamber of Commerce, Small Business Outlook Survey (April 2011).

<sup>21</sup> *Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. (2011) (statement of Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs).

<sup>22</sup> Memorandum on Regulatory Flexibility, Small Business, and Job Creation, 76 Fed. Reg. 3827 (Jan. 18, 2011).

<sup>23</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, Reginfo.gov FAQs, available at <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp> (last visited Sept. 6, 2011).

<sup>24</sup> *Id.*

Obama Administration, prior to this month, OIRA had yet to issue a single return letter.<sup>25</sup> Yet, in Administrator Sunstein's previous scholarship, he recognized that "[they] should be issued in appropriate circumstances."<sup>26</sup> In light of the examples provided in this report, such limited action by OIRA could mean it is not up to the task of policing the vast regulatory state. Even more concerning, the report also includes instances where independent regulatory agencies, not subject to the executive orders or OIRA's oversight, have run afoul of E.O. 12866 in their regulatory actions.

In addition to the requirements of E.O. 12866, regulatory agencies are required to meet other statutory requirements. For instance, the Regulatory Flexibility Act (RFA) mandates agencies analyze the impact of regulations on small entities.<sup>27</sup> If the impact is likely to be significant on a substantial number of these entities, the agency is to seek less burdensome alternatives.<sup>28</sup> Further, the law requires the Environmental Protection Agency and the Department of Labor to conduct small business review panels to help agencies measure the impact of rules.<sup>29</sup> However, as this report documents, agencies are not fulfilling their obligations under the RFA.

Agencies have also skirted the regulatory process through "sue and settle" agreements, misuse of guidance documents, and abuse of emergency rulemaking process. "Sue and settle" agreements are legal settlements, often the result of a lawsuit brought by special interest groups that mandate subsequent regulatory action under a compressed timeline.<sup>30</sup> Rules issued in this manner are often unfair to job creators because they force specific agency action often desired by environmental groups, while denying other stakeholders a seat at the table. Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However, under this Administration, they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them.<sup>31</sup> Accordingly, job creators feel forced to comply.

Finally, agencies often abuse the emergency rulemaking procedures provided for in the Administrative Procedures Act (APA).<sup>32</sup> The APA authorizes agencies to issue interim final and direct final rules under emergency conditions.<sup>33</sup> These rules are issued without the benefit of

<sup>25</sup> See Office of Management and Budget, Office of Information and Regulatory Affairs, *Reginfo.gov OIRA Returns Letters*, available at <http://www.reginfo.gov/public/do/eoReturnLetters> (last visited Sept. 6, 2011).

<sup>26</sup> Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

<sup>27</sup> 5 U.S.C. § 603 (2010).

<sup>28</sup> *Id.*

<sup>29</sup> 5 U.S.C. § 609 (2010).

<sup>30</sup> See Press Release, Committee on Oversight and Government Reform, Issa: EPA Using "Sue and Settle" to Regulate Job Creators (Apr. 19, 2011).

<sup>31</sup> See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 400 (2007) (noting that a guidance document "will, in practice, prompt a regulated entity to change its behavior" because "[t]he document still establishes the law for all those unwilling to pay the expense, or suffer the ill-will of challenging the agency in court." (internal citation omitted)).

<sup>32</sup> See Gen. Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules* 16-18 (Aug. 1998).

<sup>33</sup> *Id.* at 5-7.

initial public comment, yet they are legally binding as of the date of publication. Often times the “emergency” is a merely an unrealistic deadline in a statute.<sup>34</sup> Abuse of the emergency procedures completely deprives the public and job creators of their right to provide the agency with feedback on the expected impact of the regulation before that regulation takes legal effect. In addition to these flaws outlined above, this report notes where the agencies have exceeded congressional intent. Ironically, while the President has admitted there are legitimate complaints about regulations and has pledged to “fix them,”<sup>35</sup> none of the regulations highlighted in this report have received serious scrutiny by this Administration.

Since January, the Committee has been engaged in rigorous oversight of burdensome regulations.<sup>36</sup> This report continues that effort. The rules discussed were brought to the Committee’s attention through hearings, letters, and the website [AmericanJobCreators.com](http://AmericanJobCreators.com); they are merely a sample of regulations that document inefficiencies in the regulatory system.

## II. FLAWED ECONOMIC ANALYSIS

Pursuant to E.O. 12866, executive branch agencies are to provide an assessment of the potential costs and benefits, including reasonable alternatives, of regulations that the agency determines to be “significant.”<sup>37</sup> A regulation, among other things, is considered “significant” if it may “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”<sup>38</sup> Subsets of these are “economically significant” regulations, those expected to have an annual effect on the economy of \$100 million or more.<sup>39</sup> For all “economically significant” regulations, agencies are to conduct an even more robust and detailed cost-benefit analysis.<sup>40</sup> OIRA is required to review all “significant” regulations under E.O. 12866 and may prevent an agency from moving forward with a regulation if it determines that “the quality of the agency’s analysis is inadequate or if the regulation is not justified by the analysis.”<sup>41</sup> Further, OIRA may make its own determination that a regulation is “significant” if the agency fails to do so. The regulations below are examples of a clear failure by agencies to meet the requirements of E.O. 12866 and OIRA to properly police these agencies.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> See, e.g., Roger Runningen, *Obama Says He’s Identified Business Regulations for Elimination*, BLOOMBERG, May 12, 2011; Office of the Press Secretary, Remarks by the President to the Chamber of Commerce (Feb. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce>.

<sup>36</sup> See e.g., H. Oversight & Govt. Comm. Preliminary Staff Report, *Assessing Regulatory Impediments to Job Creation*, 112th Cong. (Feb. 9, 2011).

<sup>37</sup> Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, *Reginfo.gov* FAQs, available at <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp> (last visited Sept. 6, 2011).

## A. Grain Inspection, Packers, and Stockyards Administration Proposed Rule

### i. Rule and Purpose

On June 22, 2010, the U.S. Department of Agriculture (USDA) Grain Inspection, Packers, and Stockyards Administration (GIPSA) proposed a rule pursuant to the Food, Conservation, and Energy Act of 2008 (Farm Bill) intended to “increase fairness in the marketing of livestock and poultry”<sup>42</sup> and “clarify conditions for industry compliance with the [Packers and Stockyards Act of 1921].”<sup>43</sup> More simply, the proposed rule is an attempt to regulate livestock marketing practices. This change has caused a significant amount of alarm in the agricultural sector because it could “dismantle the business models used by livestock producers, meat packers, and poultry processors” by making commonly used marketing agreements legally risky and subject to challenge by those who are not a party to the agreements.<sup>44</sup> As a result, these agreements would be less attractive to industry and lead to higher prices and fewer options for consumers.<sup>45</sup>

### ii. Broken Process

Ranchers, livestock packers and producers, meat companies, as well as others in this community have expressed serious concerns with the development of this rule. These stakeholders argue that GIPSA has deliberately avoided conducting a meaningful cost-benefit analysis. Moreover, they argue GIPSA has not complied with the mandates of E.O. 12866 because the rule exceeds congressional authority and will encourage litigation.

In the first instance, GIPSA failed to conduct a proper economic analysis of the proposed rule in violation of E.O. 12866. Under E.O. 12866, agencies are to conduct a cost-benefit analysis in cases where the rule is determined to be “significant.”<sup>46</sup> While GIPSA determined the rule to be “significant,” it did not attempt to estimate the total of the costs or benefits of the rule.<sup>47</sup> Instead, GIPSA conducted a very minimal cost estimate of portions of the rule and provided generalized statements that it “believes potential benefits are expected to exceed costs.”<sup>48</sup> However, this bare bones analysis “never references potential costs to consumers” as well as other factors that will increase its implementation cost.<sup>49</sup> In contrast to the Administration’s lack of economic analysis, the private sector conducted three in-depth studies to understand the economic impact of the rule. The studies use various methodologies and

<sup>42</sup> USDA News Release No. 0326.10, USDA Announces Proposed Rule to Increase Fairness in the Marketing of Livestock and Poultry (June 18, 2010).

<sup>43</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338 (June 22, 2010).

<sup>44</sup> J. Patrick Boyle, *Addressing USDA Regulations*, POLITICO, Feb. 18, 2011.

<sup>45</sup> *Id.*

<sup>46</sup> Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>47</sup> See Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338 (June 22, 2010).

<sup>48</sup> *Id.* at 35346.

<sup>49</sup> Letter from U.S. Senator Pat Roberts to The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (July 26, 2010).

project different final costs; however, the conclusion is the same—the rule is not only significant, it is “economically significant,” meaning it will cost more than \$100 million annually.<sup>50</sup>

In reaction to these studies and over 60,000 public comments, GIPSA finally agreed to conduct a more “rigorous” cost-benefit analysis.<sup>51</sup> Further, USDA’s Chief Economist, Joe Glauber, recently testified at a Congressional hearing that the rule is being reclassified as “economically significant.”<sup>52</sup> This designation is extremely important because it heightens the required analysis; the fact that the rule was improperly classified at its inception likely impacted the scrutiny originally applied to it. Accordingly, those in the agricultural sector have requested GIPSA reopen the rule for public comment after the new economic analysis is complete. In addition, Senator Pat Roberts has asked OIRA Administrator Sunstein to ensure that GIPSA complies with E.O. 12866, as well as requirements under the Regulatory Flexibility Act.<sup>53</sup> Unfortunately, Secretary of Agriculture Tom Vilsack indicated that GIPSA does not plan to reopen the comment period once the new cost-benefit analysis is complete.<sup>54</sup> To date, Administrator Sunstein has not replied to Senator Roberts’ request.<sup>55</sup>

The pattern of excluding public comments goes back to the earliest days of the proposal. In March 2010, prior to proposing the rule, the USDA initiated a series of five workshops to explore competition and regulation in the agriculture industry.<sup>56</sup> One of the workshops, in May 2010, specifically addressed the poultry industry; another, in August 2010, addressed the livestock industry.<sup>57</sup> Despite the close proximity of these workshops to the rule’s proposal, on July 8, 2010, GIPSA Administrator Dudley Butler wrote to members of the livestock industry to inform them that these workshops were “separate and distinct from the GIPSA rulemaking process,” the comments made at the workshops “fall outside the comment period,” and would not be considered despite the fact they were related to the proposed rule.<sup>58</sup> Yet, in direct contrast to Administrator Butler’s letter, GIPSA used anecdotes from the May 2010 poultry workshop in an “Examples of Market Behavior” document released in conjunction with the proposed rule.<sup>59</sup> After inquiries from numerous Senators about the objectivity of GIPSA’s rulemaking process, Secretary Vilsack reversed the decision of Administrator Butler and decided that the comments

<sup>50</sup> American Meat Institute Fact Sheet, What Three Comprehensive Studies Have Said About the Cost of Proposed GIPSA Rule, available at <http://meatami.com/h/a/GetDocumentAction/i/64920> (last visited Aug. 28, 2011).

<sup>51</sup> California Poultry Federation, NCC Welcomes Vilsack’s Call for Cost-Benefit Analysis of GIPSA Rule, available at [http://www.cpf.org/index.php?option=com\\_content&task=view&id=719&Itemid=89](http://www.cpf.org/index.php?option=com_content&task=view&id=719&Itemid=89) (last visited Aug. 28, 2011).

<sup>52</sup> *Nutrition and Forestry, The State of Livestock in America: Hearing Before the S. Comm. on Agriculture*, 112th Cong. (2011) (question and answer by Joe Glauber, Chief Economist, U.S. Department of Agriculture).

<sup>53</sup> Letter from Senator Pat Roberts to The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (July 26, 2011).

<sup>54</sup> Tim Harden, *Factions trade barbs on GIPSA effort*, CAPITAL PRESS, Mar. 24, 2011.

<sup>55</sup> Email from Senate Agriculture Committee staff to House Oversight Committee staff (Sept. 8, 2011).

<sup>56</sup> USDA News Release No. 0081.10, USDA and Department of Justice Workshops to Explore Competition and Regulatory Issues in the Agriculture Industry to Begin March 12th in Iowa (Feb. 23, 2010).

<sup>57</sup> U.S. Dept. of Justice, Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy Workshop Information, available at <http://www.justice.gov/atr/public/workshops/ag2010/> (last visited Aug. 28, 2011).

<sup>58</sup> Letter from J. Dudley Butler, GIPSA Administrator, to Sam Carney, President, National Pork Producers Council (July 8, 2010).

<sup>59</sup> Letter from U.S. Senator Pat Roberts, et al. to The Honorable Tom Vilsack, Secretary, U.S. Dept. of Agriculture (Aug. 26, 2010).

at the workshops would be considered in the rulemaking process.<sup>60</sup> Absent this concession, Administrator Butler's refusal to include such comments runs contrary to the requirement in E.O. 12866 that agencies seek the involvement of those expected to be burdened by a regulation *before* issuing a notice of proposed rulemaking.<sup>61</sup>

During the public comment period GIPSA also took the unusual step of publishing an advocacy document entitled, "Misconceptions and Explanations," related to the proposed rule.<sup>62</sup> Some argue that the document was an attempt to combat against a very contentious House Agriculture Subcommittee hearing in June 2010 where broad, bipartisan concerns were raised about the proposed rule.<sup>63</sup> On its face, the document appears to attempt to persuade Congress, the press, stakeholders, and the public that the rule is needed. It has been argued such advocacy by a federal agency is "contrary to the spirit and intent of the Administrative Procedures Act."<sup>64</sup>

Not only did GIPSA fail to conduct a meaningful cost-benefit analysis of the rule and sought to exclude public participation, GIPSA also violated E.O. 12866 because the rule exceeds the agency's delegated authority and will likely spur litigation. E.O. 12866 mandates that federal agencies promulgate regulations required by law and do so in a way that minimizes the potential for litigation.<sup>65</sup> When Congress debated and passed the Farm Bill, it directed USDA to issue rules that address specific topics. However, GIPSA's proposed rule includes provisions that were explicitly rejected during the Farm Bill debate. For example, the proposed rule includes a provision that requires certain livestock packers and dealers to "maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to certain livestock producers and growers."<sup>66</sup> A similar provision addressing business justification was included in a Senate floor amendment to the Farm Bill that did not pass.<sup>67</sup> The requirement is problematic because it neglects the realities of livestock procurement. Thousands of transactions between packers and producers take place "in the field" and varying prices may be merely the result of better negotiation.<sup>68</sup>

Also, the proposed rule would no longer require a plaintiff to show "competitive injury" to the marketplace, meaning actions that "adversely affect[t] or [are] likely to adversely affect

<sup>60</sup> U.S. Dept. of Justice & U.S. Dept. of Agriculture, Public Workshops Exploring Competition Issues in Agriculture: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplaces (Aug. 27, 2010) (transcript of Sec. Vilsack's remarks).

<sup>61</sup> Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>62</sup> Grain Inspection, Packers and Stockyards Administration, Misconceptions and Explanations, *available at* <http://archive.gipsa.usda.gov/psp/rulefacts.pdf> (last visited Aug. 28, 2011).

<sup>63</sup> Letter from Rep. Jack Kingston, Ranking Member, Committee on Appropriations Agriculture Subcommittee, to The Honorable Tom Vilsack, Secretary, U.S. Dept. of Agriculture (Aug. 26, 2010).

<sup>64</sup> *Id.*

<sup>65</sup> See Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>66</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338, 35351 (June 22, 2010).

<sup>67</sup> See Tester S. Amdt. No. 3666 to H.R. 2419, Roll Call Vote, 110th Cong. (2007).

<sup>68</sup> American Meat Institute, Comments Filed, Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; 75 Fed. Reg. 35338 (June 22, 2010).

competition” in a lawsuit brought under the Packers and Stockyards Act of 1921.<sup>69</sup> This language was included in a discussion draft at a Senate committee mark-up of the Farm Bill, but was subsequently deleted.<sup>70</sup> In addition to being contrary to congressional intent, it is also inconsistent with the law as interpreted by eight federal circuit courts.<sup>71</sup> These courts, prior to and after enactment of the Farm Bill, have held that “only those practices that will likely affect competition *adversely* violate the Act.”<sup>72</sup> (emphasis added). This provision will undoubtedly increase litigation because it lowers the standard of proof necessary to demonstrate a violation of the Act. Arguably, plaintiffs will no longer need to show actual injury to the marketplace in order to prevail in court. Adding to the controversy, the author of the rule, Administrator Butler, is a former plaintiffs’ lawyer who lost a multitude of cases under the current law.<sup>73</sup> Demonstrating clear bias, shortly after Administrator Butler was appointed to his position, he previewed the GIPSA regulations at a speech before the Organization for Competitive Markets. He indicated terms in the rule would be “a plaintiff lawyer’s dream” and continued, “we can get in front of a jury on [these terms].”<sup>74</sup> (emphasis added). Administrator Butler’s clear conflict-of-interest and bias is even more troubling in light of the many ways his agency sought to avoid vetting the rule through the scrutiny of the administrative process.

### iii. Impact

The impact of the proposed rule would be extremely costly to the economy and those regulated by the rule. For instance, John Dunham and Associates, a bipartisan firm that conducts economic impact studies on various pieces of legislation, estimated the proposed rule would reduce national GDP by \$14 billion, come with a price tag of \$1.36 billion in lost revenues to the federal, state, and local governments, and jeopardize 104,000 American jobs in the meat and poultry industry.<sup>75</sup> The study also predicts livestock producers would be especially impacted by the rule, costing up to 21,274 jobs, primarily in rural America.<sup>76</sup> The study also evaluated the impact of the rule on consumers. It concluded that the cost of meat and poultry products would increase by approximately 3.33 percent, meaning consumers would pay an additional \$2.7 billion to maintain their current meat consumption.<sup>77</sup>

These findings are bolstered by two additional studies. Informa Economics, Inc., a world leader in domestic and international agricultural market research, estimated the rule would result

<sup>69</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338, 35351 (June 22, 2010).

<sup>70</sup> American Meat Institute, Comments Filed, Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; 75 Fed. Reg. 35338 (June 22, 2010).

<sup>71</sup> *Id.*

<sup>72</sup> *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010).

<sup>73</sup> See, e.g., Bob Barr, *Federal beef boss proposes self-serving changes to rules*, THE HILL, Oct. 26, 2010; Billy Gribbin, *New GIPSA Administrator is the Fox in America’s Henhouse*, AMERICANS FOR TAX REFORM, Nov. 18, 2010.

<sup>74</sup> Billy Gribbin, *New GIPSA Administrator is the Fox in America’s Henhouse*, AMERICANS FOR TAX REFORM, Nov. 18, 2010.

<sup>75</sup> John Dunham and Associates, Inc., *The American Meat Institute Meat Demand Study: The Impact of Proposed Grain Inspection, Packers and Stockyards Administration Proposed Rule 2* (Aug. 2010).

<sup>76</sup> *Id.* at app.1.

<sup>77</sup> *Id.* at 2.



in ongoing and indirect costs to the livestock and poultry industries of more than \$1.64 billion.<sup>78</sup> More specifically, it would result in losses near \$880 million for the beef industry, more than \$401 million for the pork industry, and close to \$362 million for the poultry industry.<sup>79</sup> Similarly, FarmEcon LLC, an agricultural consulting firm, estimated the impact of the rule solely on the broiler chicken industry. It concluded the rule would cost more than \$1 billion over five years in reduced efficiency, higher costs for feed and housing, and increased administrative expenses.<sup>80</sup> The study also warned the rule would “likely slow the pace of innovation, increase the costs of raising live chickens and result in costly litigation.”<sup>81</sup> Equally concerning, the study found the rule could negatively impact U.S. competitiveness abroad. According to the study,

the Proposed Rul[e] place[s] cost burdens and regulatory restrictions on U.S. broiler companies that do not apply to foreign competitors. To the extent that U.S. chicken company competitiveness in global markets is reduced, U.S. chicken net exports would likely decline in a manner similar to the recent decline in EU chicken net exports. Export competitor countries such as Brazil could reap significant benefits from the Proposed Rul[e].<sup>82</sup>

One job creator, Robbie LeValley, and her family, who co-own Homestead Meats, a small direct-beef marketing business, believes the proposed rule “will destroy our small business model, force us to lay off our employees, cripple our ability to market our cattle the way we want to, and limit consumer choice.”<sup>83</sup> She believes alternative marketing agreements are “the heart of [their] small business,” and the agreements do not warrant further government intervention or being subject to potential litigation.<sup>84</sup>

## **B. Fish and Wildlife Service Injurious Species Proposed Rule**

### **i. Rule and Purpose**

On March 12, 2010, the United States Department of the Interior, Fish and Wildlife Service (FWS) proposed a rule to designate nine snake species as “injurious” under the Lacey Act.<sup>85</sup> The species include four variations of pythons, four variations of anaconda, and the boa constrictor.<sup>86</sup> The Lacey Act, enacted in 1900 and amended in 1981, allows the FWS to list certain species as “injurious” to humans, agriculture, horticulture, forestry, and fish and

<sup>78</sup> Informa Economics, Inc., *An Estimate of the Economic Impact of GIPSA’s Proposed Rules* 53 (Nov. 2010).

<sup>79</sup> *Id.* at 51-53.

<sup>80</sup> FarmEcon LLC, *Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact* 27 (Nov. 2010).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Regulatory Incompetency: How USDA’s Proposed GIPSA Rule Hurts America’s Small Businesses: Hearing before the H. Comm. on Small Business, Subcomm. on Agriculture, Energy, and Trade*, 112th Cong. (2011) (testimony of Robbie LeValley, Homestead Meats).

<sup>84</sup> *Id.*

<sup>85</sup> *Injurious Wildlife Species; Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles*, 75 Fed. Reg. 11808 (Mar. 12, 2010).

<sup>86</sup> *Id.*

wildlife.<sup>87</sup> It was intended to prevent a species from developing a presence in the United States. Designating these species as “injurious” will make it illegal to import or transport them across state lines for essentially any purpose other than research.<sup>88</sup>

The FWS proposed the rule to allegedly protect against the spread of destructive invasive species. In the rule preamble, FWS stated “[t]he best available information indicates that this action is necessary to protect the interests of humans, wildlife, and wildlife resources from the purposeful or accidental introduction and subsequent establishment of these large constrictor snake populations into ecosystems of the United States.”<sup>89</sup> However, there is a significant body of evidence which suggests that this rule is a solution in search of a problem. While the agency action is intended to address a problem that exists in Florida, the rule has significant implications for small businesses across the United States.<sup>90</sup>

## ii. Broken Process

In proposing this rule, it appears the FWS violated the administrative process in a number of ways. First, FWS has completely ignored the counsel of the U.S. Small Business Administration, which has warned that the agency failed to analyze the economic impact the rule will have on small businesses and their workers across the country.<sup>91</sup> Second, the scientific basis underpinning the action has been called into question. Finally, there are significant questions about whether the agency should be using the Lacey Act for this purpose.

The Office of Advocacy (Advocacy), within the Small Business Administration, is the federal voice for small business interests during the rulemaking process. Advocacy informed the FWS that its Initial Regulatory Flexibility Act Analysis (IRFA) was sorely lacking. In a letter to Department of Interior Secretary Ken Salazar, Advocacy stated that it “has concerns that the IRFA does not adequately capture the economic impacts of the proposed rule on small businesses. Advocacy also believes that the IRFA does not adequately discuss significant alternatives to the proposed rule, as required by the [Regulatory Flexibility Act].”<sup>92</sup>

In its letter, Advocacy asserts that the claim by FWS that there was no time to conduct an economic analysis is baseless, and recommends that the agency supply a new IRFA.<sup>93</sup> Advocacy further criticized the FWS for not properly identifying the small businesses that would be affected by the rule. It noted the agency only acknowledged importers and companies selling snakes over state lines, but ignored other participants in the market such as those who support

<sup>87</sup> Liana Sun Wyler & Pervaze A. Sheikh, Congressional Research Service, *International Illegal Trade in Wildlife: Threats and U.S. Policy* (2010), available at <http://www.crs.gov/pages/Reports.aspx?PRODCODE=RL34395&Source=search>.

<sup>88</sup> *Injurious Wildlife Species; Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles*, 75 Fed. Reg. 11808 (Mar. 12, 2010).

<sup>89</sup> *Id.*

<sup>90</sup> Leslie Kaufman, *Snake Owners See Furry Bias in Invasive Species Proposal*, N.Y. TIMES, Jan. 8, 2011, available at <http://www.nytimes.com/2011/01/09/science/earth/09snakes.html>.

<sup>91</sup> Letter from Susan M. Walthall, Acting Chief Counsel for Advocacy, & Jamie Belcore Saloom, Assistant Chief Counsel for Advocacy, Small Bus. Admin. Office of Advocacy, to the Honorable Ken Salazar, U.S. Department of the Interior (May 10, 2010) (on file with author).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

feeding, keeping, and caring for these animals.<sup>94</sup> For instance, FWS assumed a sales reduction of 20 to 80 percent for sellers of live snakes, but did not account for a sales reduction of other market participants. Further, in regard to their limited estimate, FWS “[did] not provide factual support for [their] assumption or any further analysis.”<sup>95</sup> Finally, Advocacy notes that FWS did not consider less harmful alternatives as required by the RFA, such as regional solutions, public-private partnerships to prevent invasive imports, or educating the public about the dangers of release.<sup>96</sup>

In addition to its failure to conduct an adequate analysis of the small business impact of the rule, the scientific basis for the rule is also questionable. FWS relied on a study performed by the United States Geological Survey (USGS),<sup>97</sup> which detected the presence of some snakes as far north as North Carolina and Northern California.<sup>98</sup> However, these findings are directly contradicted by other peer-reviewed literature. For instance, two studies on Burmese pythons, which the USGS report claims have the largest potential range in the United States, demonstrate that when exposed to cold, the snakes show a high mortality rate that casts doubt on their ability to survive outside of the Everglades in South Florida.<sup>99</sup> Further, a study conducted by biologists at the City University of New York found that these snakes will only survive in South Florida and the southernmost tip of Texas.<sup>100</sup> Thus, there is still a significant debate about whether there is a national problem to be solved.

Another concern about the proposed rule is the misuse of the Lacey Act, specifically with respect to its application to species kept as pets that are already in the country in large numbers.<sup>101</sup> For instance, according to a source involved in the industry, there are an estimated 600,000 boa constrictors already in the United States as pets, if not more.<sup>102</sup> Moreover, with respect to Burmese pythons, a 2007 FWS memo explains that by “[i]nvoking the injurious species provision of the Lacey Act, [FWS] would merely create the illusion of action with little possibility of any real impact on the problem at hand.”<sup>103</sup> The memo also indicates that using

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Injurious Wildlife Species; Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles, 75 Fed. Reg. 11808 (Mar. 12, 2010).

<sup>98</sup> R.N. Reed & G.H. Rodda, Giant constrictors: biological and management profiles and an establishment risk assessment for nine large species of pythons, anacondas, and the boa constrictor: U.S. Geological Survey Open-File Report 2009-1202 (2009), available at <http://pubs.usgs.gov/of/2009/1202/pdf/OF09-1202.pdf>.

<sup>99</sup> Michael L. Avery et al., Cold weather and the potential range of invasive Burmese pythons (2010); Frank J. Mazzotti et al., Cold-induced mortality of invasive Burmese pythons in south Florida (2010).

<sup>100</sup> R.A. Pyron, F.T. Burbrink, & T.J. Guiher, Claims of Potential Expansion throughout the U.S. by Invasive Python Species Are Contradicted by Ecological Niche Models (2008), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0002931>.

<sup>101</sup> Mamie Parker and Benito Perez, Information Memorandum for the Director: Burmese Pythons and Injurious Wildlife Evaluations, Sept. 6, 2007.

<sup>102</sup> Email from David G. Barker, Owner, Vida Preciosa International (Aug. 30, 2011, 7:00pm EST) (on file with author).

<sup>103</sup> Memorandum from Mamie Parker, Assistant Director-Fisheries and Habitat Conservation, & Benito Perez, Assistant Director-Law Enforcement, to Director, U.S. Fish and Wildlife Service (Sept. 6, 2007) (on file with author).

scarce law enforcement resources on the interstate prohibition of these pets would detract from defending against other more traditional and urgent Lacey Act species.<sup>104</sup>

Finally, to the extent a problem exists, states are already taking action. Accordingly, there is no regulatory gap that the Federal government needs to step in and fill. For example, tropical Hawaii has banned these snakes, and offenders of the statute face a \$200,000 fine and three years in prison.<sup>105</sup> In Florida, five of the nine snakes proposed as “injurious” by the FWS, including the Burmese python, are already banned from possession, breeding, or sale for personal use.<sup>106</sup> In recent years, the state of Texas has passed laws requiring buyers and commercial sellers of certain snakes, including the Burmese python, to first obtain a permit. Those caught releasing these snakes receive a heavy fine.<sup>107</sup> As these examples demonstrate, states have the tools to take action, which further calls into question the merit of the regulatory action.

### iii. Impact

According to a study commissioned by the United States Association of Reptile Keepers (USARK), 99 percent of those who will be affected by this rule are small businesses.<sup>108</sup> The study estimates that in the first year, this rule will reduce industry revenues between \$76 and \$104 million.<sup>109</sup> Over the first ten years, the combined loss could be between \$505 million and \$1.2 billion.<sup>110</sup> According to Andrew Wyatt, the head of USARK, the U.S. is a global leader in the reptile industry and is responsible for an estimated 82 percent of the world’s trade in these animals.<sup>111</sup> He goes on to say the business “is a cottage industry that is booming in the United States and we need to keep it.”<sup>112</sup>

The effect of this regulatory action on small businesses could be devastating. For instance, Jeremy Stone Reptiles in Lindon, Utah, began to feel the effects of the injurious ruling as soon as it was proposed. Since 2008, Jeremy and his wife have reduced their staff from seven employees to three.<sup>113</sup> He says that if the rule goes through “my business would be over. 18 years of hard work, education, and a successful growing business would be lost. My dream of supporting my family would be over, and I would have to start over at age 37.”<sup>114</sup> Similarly,

<sup>104</sup> *Id.*

<sup>105</sup> Mari-Ela David, *Large Snake Discovered on Hawaii Island*, HAWAII NEWS NOW, Dec. 22, 2009, available at <http://www.hawaiinewsnow.com/story/11718466/large-snake-discovered-on-hawaii-island?redirected=true>.

<sup>106</sup> FLA. STAT. § 379.372 (2011).

<sup>107</sup> Shannon Tompkins, *Texas Tries to Control Invasion of Exotic Snakes*, HOUS. CHRON., Feb. 28, 2008, available at <http://www.chron.com/life/gardening/article/Texas-tries-to-control-invasion-of-exotic-snakes-1641665.php>.

<sup>108</sup> Ariel H. Collis & Robert N. Fenili, Georgetown Economic Services, LLC, *The Modern U.S. Reptile Industry* (2011).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Telephone Interview with Andrew Wyatt, Chief Executive Officer, U.S. Ass’n of Reptile Keepers (Aug. 25, 2011).

<sup>112</sup> *Id.*

<sup>113</sup> Email from Jeremy Stone, Owner, Jeremy Stone Reptiles, Inc. (Aug. 26, 2011, 12:49pm EST) (on file with author).

<sup>114</sup> Email from Jeremy Stone, Owner, Jeremy Stone Reptiles, Inc. (Aug. 31, 2011, 11:45am EST) (on file with author).

David G. Barker and his wife Tracy, who own Vida Preciosa International, a business specializing in the research and captive-propagation of pythons and boas in Boerne, Texas, will be economically devastated by the proposed rule. According to Barker:

If the proposed action is implemented, it will directly and negatively affect our incorporated small business and our family income. It will destroy some 20 years of work and it essentially confiscates the value [of] our ... investments in breeding stock, and equipment, and removes all value to our colony of breeding animals. It will stop all of our interstate and international business, which a review of our Texas State sales tax will show is 95% of our business. It will immediately reduce our family income by 35% or more at a time when work and income come hard. Additionally, our business is interconnected with many other local businesses that will be negatively affected by the restrictions placed on our business. There are thousands of other families with small snake-breeding businesses in similar situations as ours.<sup>115</sup>

In sum, it appears as though this regulatory action taken by the FWS, which did not undergo a proper economic analysis, is contrary to the purpose of the Lacey Act, is based on questionable science, and has the ability to devastate a small but thriving sector of the economy.

### C. Securities and Exchange Commission Proxy Access Final Rule

#### i. Rule and Purpose

In accord with the Dodd-Frank Act, the Securities and Exchange Commission (SEC) issued the Exchange Act Rule 14a-11, also known as the “proxy access rule,” to alter current proxy rules that govern how shareholders elect the board of directors at public companies.<sup>116</sup> Under the new rules, any shareholder or group of shareholders owning at least three percent of a public company’s voting stock for at least three years could include its own slate of nominees in the company proxy materials. By promulgating the proposed rule, the SEC sought to improve the minority shareholders’ ability to gain or expand representation on the board of directors.<sup>117</sup>

#### ii. Broken Process

The rule is an example of a broken regulatory process in that the SEC failed to properly consider the expected costs and benefits of the rule. Indeed, the Business Roundtable and the U.S. Chamber of Commerce challenged the validity of these rules in the District of Columbia Circuit Court of Appeals, arguing that the SEC violated the APA because it ignored hidden costs and failed to consider the rule’s effect on efficiency, competition and capital formation as required by both the Securities Exchange Act of 1934 and the Investment Company Act of 1940.<sup>118</sup> The SEC argued that the proposed proxy rule shows “potential benefits of improved

<sup>115</sup> Email from David G. Barker, Owner, Vida Preciosa International (Aug. 28, 2011, 11:25pm EST) (on file with author).

<sup>116</sup> Facilitating Shareholder Director Nominations: Final Rule, 75 Fed. Reg. 56668 (Sept. 16, 2010).

<sup>117</sup> See *id.*

<sup>118</sup> *Business Roundtable and Chamber of Commerce of the United States v. SEC*, No. 10-1305 (D.C. Cir. July 22, 2011).

board and company performance and shareholder value” which “justify [its] potential costs.”<sup>119</sup> The D.C. Circuit resoundingly rejected the arguments of the SEC and vacated the rule.<sup>120</sup> In its decision, the court generally declared that “the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”<sup>121</sup> The court determined “by ducking serious evaluation of [these] costs the SEC acted “arbitrarily.”<sup>122</sup>

Specifically, the SEC “hastily relied on two ‘unpersuasive studies’ which did not take into account any economic consequences.”<sup>123</sup> It made feeble attempts to estimate the costs companies might incur in proxy access fights and failed to evaluate whether the rule would “impose greater costs upon investment companies by disrupting the structure of their governance.”<sup>124</sup> The SEC also failed to take into account the use of the rule by shareholders representing special interests, such as union and government pension funds. In light of the SEC’s statutory “obligation to consider the effect of a new rule upon efficiency, competition, and capital formation,” the court held that the promulgation of the proxy access rule with these defects and others was arbitrary, capricious, and not in accordance with law.<sup>125</sup>

This case has exposed a dangerously flawed administrative process used by the SEC that will impact all companies subject to regulations that would have otherwise failed a proper cost-benefit analysis. While the court intervened in this instance, the proxy access rule is evidence of a larger problem at the SEC. As an independent agency, SEC regulations are not subject to scrutiny by OIRA and the analytical requirements of E.O. 12866.<sup>126</sup> In addition, SEC Chairman Mary Schapiro revealed that bureaucrats responsible for drafting regulations are also responsible for preparing the related cost-benefit analyses.<sup>127</sup> In other words, there is no one within the bureaucracy checking the work of those drafting regulations to identify errors or to offer objective analysis. This creates a set of incentives whereby the agency does not give serious consideration to the cost imposed by its regulations on job creators.

### iii. Impact

The SEC’s failure to properly conduct cost-benefit analyses threatens the efficiency of publicly registered companies. Such inefficiencies and unjustified burdens reduce the ability of registered companies to compete, particularly when those outside of the SEC’s jurisdiction can

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 3.

<sup>121</sup> *Id.* at 7 (emphasis added).

<sup>122</sup> *Id.* at 15.

<sup>123</sup> *See id.* at 11-12.

<sup>124</sup> *See id.* at 11; *see also id.* at 18.

<sup>125</sup> *Id.* at 6 (internal citations omitted).

<sup>126</sup> *See* Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>127</sup> Letter from Mary Schapiro, Chairman, Sec. and Exch. Comm’n, to Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, at 11 (Apr. 5, 2011); Letter from Mary Schapiro, Chairman, Sec. and Exch. Comm’n, to Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, at 1-2 (May 25, 2011) (“Commission staff members from the division or office responsible for the subject matter of a rule typically are responsible for drafting the initial cost-benefit analysis.”).

avoid the additional cost and burden.<sup>128</sup> The resulting competitive disadvantage reduces registered entities' ability to raise capital, grow, and hire employees.<sup>129</sup> As such failures continue and result in multiple regulations that create excessive burdens and costs, the aggregate impact will likely cause substantial harm to our financial markets as well, draining liquidity as businesses choose lighter regulation of markets overseen by more reasonable regulators overseas.<sup>130</sup> The SEC's poor performance evaluating the true cost of the proxy access rule highlights a fundamental failure in its duty to perform cost-benefit analysis. Hopefully the SEC will heed the court's warning.

### III. DECADES OF REGULATORY PRECEDENT REVERSED

Pursuant to E.O. 12866, executive branch agencies should only issue regulations that are, among other things, necessary to interpret law or address a compelling public need. The regulation below is an example of an independent agency, conveniently not subject to E.O. 12866 or OIRA's scrutiny, issuing a rule that defies long-standing precedent, statutory intent, and agency practice with no compelling public need. Rather, there is the unmistakable imprint of pro-union bias.

#### A. National Mediation Board Minority Voting Final Rule

##### i. Rule and Purpose

For seventy-five years, union elections in the American railroad and airline industries operated under a "majority voting rule" in which a majority of all eligible employees in the entire craft or class was required to agree on a union representative.<sup>131</sup> The National Mediation Board (NMB) – the agency charged by Congress with settling labor disputes arising under Railway Labor Act (RLA)<sup>132</sup> – specially tailored this rule to the unique national character of the railroad and airline industries.<sup>133</sup> It was purposefully unlike the certification process for union elections in localized industries, where a majority of employees voting in the election could certify a local union,<sup>134</sup> and thirty percent of employees could begin the decertification process.<sup>135</sup> In May 2010, the NMB promulgated a new rule that abandoned its decades-old precedent in favor of union certification by only a small number of employees.<sup>136</sup> Under this "minority voting rule," the Board can "certify as collective bargaining representative any organization which receives a majority of valid ballots cast in an election."<sup>137</sup>

<sup>128</sup> See Financial Services Authority, *The Economic Rationale for Financial Regulation* (Apr. 1999).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 45 U.S.C. § 152, Fourth.

<sup>132</sup> 45 U.S.C. § 151 *et seq.* The NMB was established by Congress in 1934. See Pub. L. No. 73-442, 48 Stat. 1185 (1934). Congress added the airline industry to the NMB's jurisdiction in 1936. See Pub. L. No. 74-487, 49 Stat. 1189 (1936).

<sup>133</sup> See National Mediation Board, *Administration of the Railway Labor Act by the National Mediation Board 1934-1970*, at 70 (1970).

<sup>134</sup> 29 U.S.C. § 159(a).

<sup>135</sup> See *id.* § 159(e)(1).

<sup>136</sup> See Representation Election Procedure, 75 Fed. Reg. 26062, 26062 (May 11, 2010).

<sup>137</sup> *Id.*

## ii. Broken Process

The process by which NMB adopted the minority voting rule was fundamentally flawed. The NMB “has a long-standing policy of amending its rules only when required by statute or when essential to the administration of the [RLA].”<sup>138</sup> When changing its policy, the NMB committed itself to doing so only after “a full, evidentiary hearing with witnesses subject to cross-examination,”<sup>139</sup> and it required the level of proof for such a change to be “quite high.”<sup>140</sup> As recently as 2008, the NMB reaffirmed that it “would not make such a sweeping [policy] change without first engaging in a complete and open administrative process to consider the matter.”<sup>141</sup> Yet, in promulgating the minority voting rule, the NMB did just the opposite. It held a superficial public meeting in which each commenter was limited to only twenty minutes, without any right to cross-examination or a full development of the issues.<sup>142</sup> The NMB did not articulate any pressing need or a statutory authorization for the change – aside from a vague assertion that the majority rule “was adopted in an earlier era, under circumstances that are different from those prevailing in the rail and air industries today.”<sup>143</sup> Without a more detailed explanation, the NMB failed to provide a reasoned analysis for the rule change, as required by law.<sup>144</sup>

In particular, the internal deliberations of the Board showcase the extent to which the rulemaking was flawed. The two NMB board members who authored the minority voting rule – Harry Hoglander and Linda Puchala – were both appointed by President Obama.<sup>145</sup> In a breach of the NMB’s longstanding cooperative approach to rulemaking, Board Members Hoglander and Puchala excluded the third board member, Chairman Elizabeth Dougherty – the lone Republican appointee – from the decision-making process and unreasonably limited her ability to dissent from the proposed rule.<sup>146</sup> Chairman Dougherty was made aware of the proposed rule only at the eleventh hour, after Board Members Hoglander and Puchala had drafted the rule and were preparing to formally issue it.<sup>147</sup> She was first told that she could not publicly dissent from the proposed rule, and after she protested, she was allowed to author a dissent, albeit with severe

<sup>138</sup> *Chamber of Commerce*, 14 N.M.B. 347, 356 (1987).

<sup>139</sup> *Chamber of Commerce*, 13 N.M.B. 90, 94 (1986).

<sup>140</sup> *Chamber of Commerce*, 14 N.M.B. at 363.

<sup>141</sup> *Delta Air Lines, Inc.*, 35 N.M.B. 129, 132 (2008).

<sup>142</sup> See NMB Open Meeting Speakers List, [http://www.nmb.gov/representation/proposed-rulemaking/speakers-list\\_12-07-09.html](http://www.nmb.gov/representation/proposed-rulemaking/speakers-list_12-07-09.html).

<sup>143</sup> Representation Election Procedure, 75 Fed. Reg. 26062, 26062 (May 11, 2010).

<sup>144</sup> *Panhandle Eastern Pipe Line Co. v. Fed. Energy Regulatory Comm’n*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (“The public interest may change either with or without a change in circumstances . . . but an agency changing its course must supply a reasoned analysis . . . . [I]f it wishes to depart from its prior policies, it must explain the reasons for its departure.”).

<sup>145</sup> President Obama nominated Linda Puchala on March 13, 2009. See Press Release, President Obama Announces More Key Administration Posts (Mar. 13, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-More-Key-Administration-Posts-3-13-09/](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-More-Key-Administration-Posts-3-13-09/). President Obama re-nominated Harry Hoglander on June 9, 2009. See Press Release, President Obama Announces More Key Administration Posts (June 9, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-More-Key-Administration-Posts-6-9-09/](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-More-Key-Administration-Posts-6-9-09/).

<sup>146</sup> See Letter from Elizabeth Dougherty to United States Senators Mitch McConnell, Johnny Isakson, Pat Roberts, Tom Coburn, Judd Gregg, Michael Enzi, Orin Hatch, Lamar Alexander, and Richard Burr (Nov. 2, 2009).

<sup>147</sup> *Id.*



content and time restrictions.<sup>148</sup> In Chairman Dougherty's view, the rulemaking process exhibited a "complete absence of any principled process or consideration of [her] role as an equal Member of the Board."<sup>149</sup> Chairman Dougherty has publicly documented her disagreement with the rule and the "unprecedented" procedures the Board used to finalize it.<sup>150</sup> The rule currently faces a challenge in federal court as an arbitrary and capricious exercise of agency authority and as being contrary to legislative intent.<sup>151</sup> Oral argument is scheduled for September 19, 2011.<sup>152</sup>

The highly irregular process for developing this rule strongly suggests that the NMB majority had already decided to change the rule to favor organized labor and that the rulemaking process was a mere formality to be dispensed with as quickly as possible. The timing of the rule change is particularly concerning. The majority voting rule had been in place for seventy-five years, and as recently as 2008, the Board denied a request to change it.<sup>153</sup> After the 2008 presidential election changed the composition of the NMB, and as the Board faced several large representational elections, the Board received a request from the Transportation Trades Department of the AFL-CIO to change the election procedures.<sup>154</sup> The two Democratic-appointed members of the Board then quickly initiated a rulemaking with only limited public comment and without any consultation from the sole Republican-appointed Board member. These unusual circumstances leave "unattractive inferences involving a shift in political power and the imminence of several large representation elections."<sup>155</sup> These inferences are particularly unsettling given the corresponding actions of two labor unions – the International Association of Flight Machinists (IAM) and the Association of Flight Attendants (AFA) – in withdrawing their representation applications simultaneous to the publication of the proposed rule.<sup>156</sup> The AFA announced its withdrawal on the same day that the NMB issued the proposed minority voting rule,<sup>157</sup> even though the prospective application of the rule was not publicly known prior to its publication. If the AFA had not withdrawn its application, it would have been subjected to the majority voting rule. The close proximity of the withdrawals to the publication of the proposed rule suggests that someone within the Board may have improperly communicated with the unions about the rule's prospective application.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Representation Election Procedure, 75 Fed. Reg. 26062, 26083-88 (May 11, 2010) (Dougherty, dissenting); Letter from Elizabeth Dougherty to United States Senators Mitch McConnell, Johnny Isakson, Pat Roberts, Tom Coburn, Judd Gregg, Michael Enzi, Orin Hatch, Lamar Alexander, and Richard Burr (Nov. 2, 2009).

<sup>151</sup> See *Air Transp. Assoc. of America v. Nat'l Mediation Bd.*, No. 10-5253 (D.C. Cir. filed May 11, 2011).

<sup>152</sup> United States Court of Appeals for the District of Columbia Circuit, Public Calendar from 09/12/2011 through 10/23/2011, <http://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000>.

<sup>153</sup> See *Delta Air Lines*, 35 N.M.B. at 132.

<sup>154</sup> See Letter from Edward Wytkind, Transportation Trades Department, to Elizabeth Dougherty, Harry Hoglander, and Linder Puchala, National Mediation Board (Sept. 2, 2009).

<sup>155</sup> Representation Election Procedure, 75 Fed. Reg. 26062, 26085 (May 11, 2010) (Dougherty, dissent).

<sup>156</sup> See *id.* at 26083 n. 2.

<sup>157</sup> Press Release, AFA-CWA Applauds National Mediation Board for Proposed Voting Procedure Change (Nov. 3, 2009), available at <http://www.afacwa.org/default.asp?id=1229>.

### iii. Impact

The new minority voting rule threatens to significantly harm our economy and, in particular, our domestic airline industry. Certification of a union representative without majority support may cause difficulty in ratifying collective bargaining agreements and an inability of the airlines to prevent unauthorized work stoppages.<sup>158</sup> Such labor uncertainty is dangerous to our economic recovery, as the commercial airlines contribute \$731 billion to the gross domestic product and affect almost 11 million jobs.<sup>159</sup> Moreover, with two million people and 50,000 tons of cargo flying daily,<sup>160</sup> the effects of labor strife will assuredly be felt by every American. The rule likewise adversely affects airline employees. For example, Mathew Palmer, a Delta flight attendant, believes that his job will be directly affected by the rule change insofar as his career “depends on whether [flight attendants] are unionized or not.”<sup>161</sup> He stated that his current pay and benefits at Delta are better to those in any proposed union contract for Delta flight attendants, and that non-unionization allows Delta to be flexible with its employees.<sup>162</sup> Palmer labeled the minority voting rule as “silly” because, in his words, a union “is only as good as supported” by the employees.<sup>163</sup> In the coming months, Delta flight attendants will continue to face uncertainty as the NMB investigates allegations of interference during the most recent union election.<sup>164</sup> Delta, as a result, cannot move forward in “fully aligning the complete package of pay, benefits, work rules, and seniority for all of [its] flight attendants.”<sup>165</sup>

In adopting this rule, the NMB ignored seventy-five years of representation elections that reflected the unique national character and importance of the railway and airline industries. The new rule, despite affecting billion of dollars and millions of jobs, was not deemed “significant” by the NMB.<sup>166</sup> It was, however, a departure from the law, a deviation from the Board’s own deliberative practices, and striking evidence of the Board’s favoritism to organized labor.

## IV. SUE AND SETTLE AGREEMENT

“Sue and settle,” a term coined by Minnesota Democratic Rep. Colin Peterson, refers to questionable decisions by regulatory agencies, most frequently the EPA, to settle lawsuits brought against them by special interest environmental groups.<sup>167</sup> In doing so, agencies bypass the proper rulemaking process and avoid basic principles of transparency and accountability. The removal of the opt-out provision in the lead paint rule is a blatant example of the EPA entering into one of these agreements to the detriment of job creators.

<sup>158</sup> See Representation Election Procedure, 75 Fed. Reg. 26062, 26086 (May 11, 2010) (Dougherty, dissent).

<sup>159</sup> See Air Transport Association, Economic Impact, *available at*

<http://www.airlines.org/Economics/AviationEconomy/Pages/EconomicImpact.aspx>.

<sup>160</sup> See Air Transport Association, When America Flies, It Works: 2010 Economic Report 12, *available at*

<http://www.airlines.org/Economics/ReviewOutlook/Documents/2010AnnualReport.pdf>.

<sup>161</sup> Telephone Interview with Matthew Palmer, Delta Air Lines Flight Attendant (Aug. 15, 2011).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Email from Joanne Smith, Senior Vice President, Delta Air Lines, to All Delta Flight Attendants (June 1, 2011).

<sup>165</sup> *Id.*

<sup>166</sup> See Representation Election Procedure, 75 Fed. Reg. 26062 (May 11, 2010).

<sup>167</sup> See Press Release, Committee on Oversight and Government Reform, Issa: EPA Using “Sue and Settle” to Regulate Job Creators (Apr. 19, 2011).

## A. Environmental Protection Agency Lead Paint Opt-Out Provision Final Rule

### i. Rule and Purpose

In 2008, the Environmental Protection Agency (EPA) issued the Lead Renovation, Repair and Painting Rule pursuant to the Toxic Substances Control Act to address lead-based paint hazards in housing and child-occupied facilities built before 1978.<sup>168</sup> The rule requires that renovations to a home built before 1978 follow certain work practices supervised by an EPA-certified renovator and performed by an EPA-certified firm.<sup>169</sup> After a thorough review of the science and consultation with small businesses, EPA determined that an opt-out provision in the rule, exercised at the election of a homeowner, could still protect from the dangers of lead paint.<sup>170</sup> The opt-out provision allowed a job creator to forgo the training and work practice requirements if they obtained a certificate from the homeowner stating that no children under age six or a pregnant woman resided in the home.<sup>171</sup> However, this balanced approach was challenged by special interest environmental groups. Instead of defending the rule in court, EPA opted to enter into a settlement agreement. This settlement agreement, negotiated solely between EPA and special interests, required EPA to propose and finalize a new rule that removed the opt-out provision.<sup>172</sup> On October 28, 2009, EPA proposed the rule, and it was finalized on May 6, 2010.

Unfortunately, in addition to dramatically increasing costs for job creators and homeowners alike, it appears that removing the opt-out provision may be increasing the risk of exposure to lead paint. Since EPA finalized the rule, many homeowners are choosing to perform their own renovations or hiring “fly-by-night” contractors in order to avoid the higher costs charged by EPA certified contractors.<sup>173</sup>

### ii. Broken Process

EPA’s pledge to remove the opt-out provision demonstrates a broken regulatory process because the decision was not the result of careful study, but rather an exclusive negotiation between EPA and environmentalists. Because the rule was negotiated only with these interest groups, the interests of other stakeholders, like small business owners, were not adequately represented. Rules issued in this manner are often unfair and detrimental to job creators in that they force specific agency action often desired by environmental groups, while denying other stakeholders a seat at the table. For instance, it appears that EPA violated the Regulatory

<sup>168</sup> Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).

<sup>169</sup> *Id.*

<sup>170</sup> Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Env’tl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Env’tl Prot. Agency (Nov. 27, 2009).

<sup>171</sup> Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).

<sup>172</sup> Motion to Sever and Hold in Abeyance Nos. 08-1235 and 08-1258, *Nat’l Assoc. of Homebuilders v. Env’tl Prot. Agency*, No. 08-1193 (D.C. Cir. Aug. 26, 2009) (settlement agreement between the EPA and public interest groups).

<sup>173</sup> National Association of the Remodeling Industry, Summary of Survey about the EPA’s Lead Renovation, Repair, Painting (LRRP) Rule (July 2011).

Flexibility Act (RFA) when it agreed to the settlement.<sup>174</sup> After the settlement was reached, the Small Business Administration Office of Advocacy (Advocacy), which was created by Congress to advocate the views of small businesses before Federal agencies and Congress,<sup>175</sup> wrote a scathing letter to the EPA criticizing them for neglecting to adequately consider the impact of the rule on small business.<sup>176</sup> Advocacy pointed out that for rules that are expected to have a “significant economic impact on a substantial number of small entities,” EPA is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the proposed rule on small entities, and to consider less burdensome alternatives.<sup>177</sup>

In its letter, Advocacy asserted that EPA neglected to adhere to the requirements of the RFA by “fail[ing] to perform needed outreach and fail[ing] to examine seriously several regulatory alternatives that would minimize the small business burdens while achieving the same regulatory goals.”<sup>178</sup> Specifically, Advocacy stated that because the EPA signed the settlement agreement, which mandated that the proposed rule be issued by a certain time, Advocacy “did not have a timely opportunity to discuss the Small Business Advocacy Review Panel requirement with the EPA before the proposal was issued.”<sup>179</sup>

In addition to EPA’s violation of the RFA, Advocacy also correctly pointed out that the EPA did not rely on any new science when it decided to remove the opt-out provision. Instead, EPA merely re-evaluated the original science.<sup>180</sup> Advocacy claimed this re-interpretation was “unconvincingly thin,” to demonstrate the claimed benefits to society.<sup>181</sup> EPA’s claimed benefits directly conflict with conclusions drawn by the agency in 2008. At that time, EPA explained that it “does not believe it is an effective use of society’s resources to impose this final rule requirements [sic] on all renovations . . . .”<sup>182</sup> Therefore, absent the settlement agreement, it is hard to reconcile EPA’s position in 2008 that an opt-out provision could preserve the net benefits of the rule, with EPA’s removal of the opt-out provision just two years later.<sup>183</sup>

<sup>174</sup> Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Env’tl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Env’tl Prot. Agency (Nov. 27, 2009).

<sup>175</sup> Pub. L. No. 94-305, 90 Stat. 663 (1976).

<sup>176</sup> Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Env’tl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Env’tl Prot. Agency (Nov. 27, 2009).

<sup>177</sup> See 5 U.S.C. § 609(a), (b).

<sup>178</sup> Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Env’tl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Env’tl Prot. Agency (Nov. 27, 2009).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).

<sup>183</sup> Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Env’tl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Env’tl Prot. Agency (Nov. 27, 2009).

### iii. Impact

There is evidence that this rule unnecessarily raises costs, drives homeowners to use inexperienced and untrained contractors, and encourages “do-it-yourself” work which could actually endanger children’s health.<sup>184</sup> A recent survey about the rule conducted by the National Association of the Remodeling Industry shows that 77 percent of homeowners are avoiding the added cost of the rule by doing remodeling work on their own, or hiring a non-certified contractor to perform the work.<sup>185</sup> Accordingly, job creators in the construction industry are feeling the impact. For example, Ryann Day, who owns a home-remodeling and construction company in Seattle, Washington, believes “the EPA’s regulation on lead paint is the most restrictive regulation.”<sup>186</sup> Ryann has lost 10 to 20 job opportunities to his competitors who offer lower bids because they do not comply with the rule. As a result, he chose not to hire an additional employee and lost approximately \$15,000 to \$20,000 in business. Homeowners who do accept his bid are forced to pay an additional 20 percent surcharge if their homes were built before 1978. He said “we need to be able to operate our business in a common sense dictated market where customers and contractors make decisions based on knowledge and ability, not on government-imposed regulations.”<sup>187</sup> This sentiment was echoed by Tim Englert, the President of Tim Englert Construction, who said “since the opt-out provision disappeared, it’s a hardship on the whole industry that is unwarranted.”<sup>188</sup> The rules are “setting contractors up for failure,” and there is “no incentive to expand my business with all the unknowns.”<sup>189</sup>

Due to EPA’s decision to enter into a “sue and settle” agreement with special interest environmental groups and remove the balanced “opt-out” provision in the 2008 rule, job creators are forced to comply with a job killing regulation that lacked their input and violated the RFA.

## V. MISUSE OF GUIDANCE DOCUMENTS

Guidance documents, while not legally binding, are supposed to be issued only to clarify regulations already on the books.<sup>190</sup> However, under this Administration, they are increasingly used to effect policy changes. While not technically enforceable, they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them.<sup>191</sup> Accordingly, job creators feel pressure to abide by them because they fear backlash from agencies. Agencies who wish to avoid meaningful scrutiny can avoid regulatory analyses by issuing policy changes through guidance documents. OIRA claims to review “significant” guidance documents,<sup>192</sup> but because they are not technically regulations, it is unclear what

<sup>184</sup> *Id.*

<sup>185</sup> National Association of the Remodeling Industry, Summary of Survey about the EPA’s Lead Renovation, Repair, Painting (LRRP) Rule (July 2011).

<sup>186</sup> Submission of Ryann Day to AmericanJobCreators.com and his interview with Committee staff (May 20, 2011).

<sup>187</sup> *Id.*

<sup>188</sup> Submission of Tim Englert to AmericanJobCreators.com and his interview with Committee staff (June 7, 2011).

<sup>189</sup> *Id.*

<sup>190</sup> See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 399-400 (2007).

<sup>191</sup> *Id.* at 400.

<sup>192</sup> Memorandum from Peter R. Orszag, Director, Office of Management and Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009).

criteria OIRA is using. Below is an example of EPA's attempt to negatively impact the mining industry through a guidance document.

#### A. Clean Water Act Section 404 Permitting Guidance

##### i. Rule and its purpose

A crucial step in developing or expanding a mining site is the permitting process. Clean Water Act (CWA) Section 404 permits are just one of dozens of permits required to begin operations, but operators are literally going bankrupt because of the excessive delays in receiving this particular permit.<sup>193</sup> These delays are due to an "enhanced review process" initiated in violation of the Administrative Procedure Act (APA).

Section 404 of the CWA regulates activities, including mining operations, which "discharge dredge and fill material" into "waters of the United States." Through the CWA, Congress gave the Army Corps of Engineers (Corps) the authority to issue permits (referred to as 404 permits) for such activities, but EPA and other agencies may review and comment on permit applications. The Corps issues the 404 permits using guidelines established by the EPA. EPA also has a unique authority under section 404(c) to prohibit, restrict, or withdraw the "specification" of a disposal site, and thereby can influence the Corps' permitting decisions.

EPA has taken a number of actions in the past few years to expand and exert its influence over 404 permits. These actions began in June 2009 when EPA and the Corps issued a joint "enhanced coordination memorandum" ("EC memo") to "facilitate" review of 108 pending permits for coal mines.<sup>194</sup> Pursuant to the EC memo, EPA concluded that 79 of the 108 pending permits "raised environmental concerns" and thus would be subject to further enhanced review.<sup>195</sup>

On April 1, 2010, EPA released a new guidance document entitled "Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" ("Guidance memo").<sup>196</sup> The Guidance memo, among other things, set a numeric standard for conductivity levels in streams affected by coal mining. Although labeled "interim final" guidance, the guidelines were to be applied to permit reviews "immediately." The "final" guidance was issued July 21, 2011.<sup>197</sup>

<sup>193</sup> H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).

<sup>194</sup> Memorandum of Understanding Among the U.S. Dept of the Army, U.S. Dept of the Interior, and U.S. Envtl Prot. Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009).

<sup>195</sup> Appalachian Surface Coal Mining Initial List Resulting from Enhanced Coordination Procedures, *available at* [http://www.epa.gov/owow/wetlands/pdf/ECP\\_Factsheet\\_09-11-09.pdf](http://www.epa.gov/owow/wetlands/pdf/ECP_Factsheet_09-11-09.pdf).

<sup>196</sup> See Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, Environmental Protection Agency (Apr. 1, 2010), *available at* [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010\\_04\\_01\\_wetlands\\_guidance\\_appalachian\\_mntop\\_mining\\_detailed.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mntop_mining_detailed.pdf).

<sup>197</sup> Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, Environmental Protection Agency (Apr. 1, 2010), *available at* [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010\\_04\\_01\\_wetlands\\_guidance\\_appalachian\\_mntop\\_mining\\_detailed.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mntop_mining_detailed.pdf).

## ii. Broken process

Federal agencies use guidance documents to reinterpret existing rules. Guidance documents are not subject to the rigorous notice and comment process required by the APA, but do not have a legally binding effect.<sup>198</sup> By contrast, if the document does have a legally binding effect and was not subjected to the notice and comment process, then it violates the APA. The analysis often turns on whether the rule effectively amended a properly promulgated rule.<sup>199</sup> It appears that EPA's Guidance Document, issued on April 1, 2010, violates this basic principal.

EPA Administrator Lisa Jackson called the Guidance "a sweeping regulatory action that affects not only all coal mining in the region, but also other activities with the potential to impact Appalachian stream quality."<sup>200</sup> Moreover, Administrator Jackson said, "[there are] no, or very few, valley fills that are going to meet this standard."<sup>201</sup> By definition, a guidance document should never be a sweeping regulatory action. Furthermore, new guidance that drastically decreases the percentage of the regulated community capable of meeting the standard effectively amends the existing rule. Accordingly, it appears that EPA issued the Guidance in violation of the APA when it failed to make these dramatic changes through the informal rulemaking process.

The U.S. District Court for the District of Columbia agrees. In its January 2011 opinion, denying a motion to dismiss and a motion for preliminary injunction, the court stated that the EC Memo and the Guidance "appear to qualify as legislative rules because they seemingly have altered the permitting procedures under the Clean Water Act by changing the codified administrative review process."<sup>202</sup> Furthermore, they "appear to be applied in a binding manner."<sup>203</sup>

In January 2011, EPA took its guidelines one step further. Rather than limit their application to just pending and future permits, EPA applied the guidelines to an already issued permit. Citing the Guidance memo and its authority under section 404(c), EPA revoked a permit, validly issued back in January 2007 by the Corps, for the Spruce No. 1 Mine in Logan County, West Virginia.<sup>204</sup>

## iii. Impact

Under the EC Memo, Obama Administration officials choose certain Appalachian CWA permits for additional review by the Corps and EPA. This review goes beyond the normal scope of CWA permitting, subjecting the permit applicant to longer delays and effectively second-guessing the Corps' decisions on CWA permits. Initially, there were 79 permits on the enhanced

<sup>198</sup> Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 789 (2010).

<sup>199</sup> *Id.*

<sup>200</sup> Pam Kasey, *EPA Sets Standards for Water Quality Below Mining Operations*, THE STATE JOURNAL, Apr. 2, 2010.

<sup>201</sup> *Id.*

<sup>202</sup> *Nat'l Mining Assoc. v. Jackson*, No. 10-1220, slip op. at 19 (D.D.C. Jan. 14, 2011).

<sup>203</sup> *Id.* at 16.

<sup>204</sup> Ken Ward, Jr., *EPA Vetos Spruce Mine Permit*, THE CHARLESTON GAZETTE, Jan. 13, 2011.

review list. Eight of those permits have been issued, 49 have been withdrawn, 22 are awaiting review on the list, and two are currently in active review.<sup>205</sup> The extreme delay caused by the new “enhanced review” process has led to a virtual permit moratorium -- new development and investment in the industry is near a standstill.

According to a Senate Environment and Public Works Committee report on these permits, the vast majority of the permits placed on hold by EPA belonged to small businesses applicants.<sup>206</sup> The permit moratorium has a greater adverse effect on small businesses because those businesses are not able to sustain themselves while they wait for EPA to evaluate and approve their applications. In fact, of the 49 withdrawn permits, many of the permit applicants have since entered bankruptcy because of their inability to wait out EPA’s “enhanced review process.”<sup>207</sup> The permits flagged for “enhanced review” are expected to produce over two billion tons of coal through operations and support roughly 17,806 existing and new jobs and 81 small businesses.<sup>208</sup>

Operators still trying to work within the system face dramatically more stringent standards under the Guidance memo. In many cases, EPA is expecting the operators to leave the water cleaner after dredging and filling operations are complete than it is today.<sup>209</sup> Improving water quality to a level not attained before the permitted activity even takes place is difficult if not impossible.

Further, the negative effects of unlawful rulemaking are compounded when the policy change leads to the retroactive revocation of validly issued permits. The regulatory uncertainty created by retroactive agency action is troublesome in light of today’s economy. As Senator Joe Manchin warned, “What the EPA doesn’t seem to understand is that this decision has ramifications that reach far beyond coal mining in West Virginia. The EPA is jeopardizing thousands of jobs and essentially sending a message to every business and industry that the federal government has no intention of honoring past promises and that no investment is safe. That message will destroy not only our jobs, but our way of life.”<sup>210</sup> Now, more than ever, the EPA must not inappropriately impede investment and job security in the energy industry.

Surface and underground coal mining supports a significant amount of economic activity, stimulates economic growth and job creation in Appalachia, and provides affordable electricity to the region. The Appalachian region has 1,639 mining operations as of 2009, which employ 57,979 workers.<sup>211</sup> The job of a coal miner, while difficult, is well paying, with an average starting salary of \$60,000 a year.<sup>212</sup> A Penn State University study found that every coal mining

<sup>205</sup> H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).

<sup>206</sup> U.S. S. Comm. on Environment and Public Works, *The Obama Administration’s Obstruction of Coal Mining Permits in Appalachia* (May 21, 2010).

<sup>207</sup> H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).

<sup>208</sup> U.S. S. Comm. on Environment and Public Works, *The Obama Administration’s Obstruction of Coal Mining Permits in Appalachia* (May 21, 2010).

<sup>209</sup> H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).

<sup>210</sup> Press Release, Senator Joe Manchin: EPA’s Unprecedented and Irresponsible Decision Jeopardizes our Economic Recovery and Jobs (Jan. 13, 2011).

<sup>211</sup> Coal Mining Productivity by State and Mine Type, 2009, *available at* [www.eia.gov](http://www.eia.gov).

<sup>212</sup> Devin Dwyer, *Craving Coal Dust “Like Nicotine”: Why Miners Love the Work*, ABCNEWS, Apr. 7, 2010, *available at* <http://abcnews.go.com/US/Mine/west-virginia-coal-miners-allure-dangerous-profession/story?id=10305839>.



job supports 11 other jobs in a local community – from truckers and railroad workers to equipment suppliers.<sup>213</sup> Using this calculation, the EPA’s permitiorium has a direct and indirect impact on over 162,000 jobs.

The personal accounts are even more disturbing. John Stilley, president of Amerikohl, a small coal company in Pennsylvania, testified before Congress and spoke about the impact of EPA’s policy on his business. He said “it’s taking us anywhere from probably 2 to 3 ½ years now to secure a permit. All the while, our coal mines, from start to finish, only last from 6 months to a year and a half.”<sup>214</sup> Mr. Stilley’s small business goes through approximately 10 permits a year in Pennsylvania.<sup>215</sup> This permitiorium effectively hinders his business’s ability to create jobs and stay economically viable. Similarly, Roger Horton, founder of Citizens for Coal, a non-profit organization that advocates for coal production in West Virginia and a member of Local Union 5958 of the United Mine Workers of America, has seen firsthand the “social and economic disruptions” in his community created by EPA’s broken process.<sup>216</sup> While not directly affected by 404 permitting, Mr. Horton describes how a large surface mine in Logan County, West Virginia, was put out of business by EPA’s regulatory interference. Not only did 400 members of Horton’s Local 2935 union lose their jobs, the school system and social welfare programs suffered because of lost revenues.<sup>217</sup> Local businesses – gas stations, restaurants, repair shops, and equipment vendors – closed as residents moved to other states looking for work.<sup>218</sup> He describes families “suffering and disintegrating” as substance abuse and divorces increased in the community. Horton feels that the communities and families of Logan County have never truly recovered from the job loss that occurred because of this breakdown in EPA process.<sup>219</sup>

## VI. ABUSE OF EMERGENCY RULEMAKING PROCESS—INTERIM FINAL RULES

Interim final rules go into effect immediately after publication, but are open for public comment for a specific period of time, and may be revised at a later time.<sup>220</sup> They are frequently issued as a result of a statutory obligation or emergency circumstance.<sup>221</sup> Yet, these rules are problematic because they promote uncertainty in the rulemaking process and limit public input. Job creators are forced to take action right away, but remain anxious that their regulatory requirements could change. The “grandfathering” interim final rule, discussed below, demonstrates this concern.

<sup>213</sup> Adam Rose & Oscar Frias, The Pennsylvania State University, The Impact of Coal on the U.S. Economy (1994).

<sup>214</sup> *EPA’s Appalachian Energy Permitiorium: Job Killer or Job Creator?: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov’t Spending of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. (2011) (statement of John Stilley).

<sup>215</sup> *Id.*

<sup>216</sup> *EPA’s Appalachian Energy Permitiorium: Job Killer or Job Creator?: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov’t Spending of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. (2011) (statement of Roger Horton).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See Gen. Accounting Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules 16-18 (Aug. 1998).

<sup>221</sup> *Id.*

**A. Internal Revenue Service, Department of Labor, and Department of Health and Human Services “Grandfathering” Joint Interim Final Rule**

**i. Rule and Purpose**

President Obama promised that the Patient Protection and Affordable Care Act (PPACA) would allow individuals who like their current health insurance to keep it.<sup>222</sup> To make this possible, the PPACA included a grandfathering provision. Plans that meet the grandfathering criteria, although subject to some aspects of the law,<sup>223</sup> remain exempt from many of PPACA’s mandates. The PPACA deferred to agencies, however, to provide details through regulatory rulemaking.

On June 14, 2010, the Internal Revenue Service, Department of Labor, and Department of Health and Human Services jointly issued an interim final regulation (IFR) to govern the applicability of the PPACA to health plans in existence at the time the PPACA was signed into law on March 23, 2010. This IFR was subsequently amended on November 17, 2010. According to the regulation, plans would remain grandfathered as long as they did not make any “significant” changes. However, it appears that vague definitions and lack of clarity in the rule are causing health plans to lose their “grandfathered” status and are creating uncertainty for job creators.

**ii. Broken Process**

The evolving nature of the grandfathering rule represents a significant flaw in the regulatory process. The regulation was issued in the form of an interim final rule, which—although not the final rule—became effective as written on the date of publication and prior to the solicitation and consideration of any public comment. The Administration accomplished this by invoking a statutory exception allowing it to forgo the customary notice and public comment process and opt instead for a shorter, less transparent process without meaningful public participation.<sup>224</sup> The Administration’s failure to utilize a robust notice and comment rulemaking process shut job creators out of the process and created uncertainty regarding the status of many plans.

Further, the Administration has yet to issue a final rule,<sup>225</sup> so the rule could change at any time.<sup>226</sup> The IFR has already been amended once,<sup>227</sup> and can be further modified by issuing

<sup>222</sup>U.S. Department of Health and Human Services, HealthReform.Gov, viewed September 8, 2011, available at <[http://www.healthreform.gov/newsroom/keeping\\_the\\_health\\_plan\\_you\\_have.html](http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html)>.

<sup>223</sup>Patient Protection and Affordable Care Act § 1251(a)(2)-(4); Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538; 34,542 (June 17, 2010) (to be codified at 45 C.F.R. pt. 147) (*providing a table of PPACA provisions that apply to grandfathered health plans, which include prohibitions on excluding coverage for pre-existing conditions (PPACA § 2704), imposing limits to coverage (PPACA § 2711), and rescinding coverage (PPACA § 2712)*).

<sup>224</sup> 26 U.S.C. § 9833 (1996); 29 U.S.C. § 734 (1974); 42 U.S.C. § 2792 (1944).

<sup>225</sup>Nearly 10 months ago, in connection with the November 17, 2010 amendment to the July 14, 2010 interim final rule, the Administration stated that the final regulations on grandfathered plans would be issued “in the near future.”

binding guidance whenever the Administration feels the need to do so.<sup>228</sup> The ad hoc process of issuing guidance serves as a backdoor method of imposing additional requirements, decreasing the public's input in the regulations that govern their actions and increasing uncertainty. These modifications can have significant impacts, as did the November 2010 amendment, which removed a prohibition on switching insurance providers.<sup>229</sup> In that regard, employers that changed providers under the original IFR relinquished their grandfathered status. Had the amended IFR been in effect when the provider change occurred, however, those plans would still be grandfathered today. Additionally, administrative guidance has often times been cloaked in such informal garb as website "FAQs,"<sup>230</sup> which catches employers off guard and generates questions about the guidance's legal relevance. Under this ephemeral set of standards, changes to grandfathered plans that are of no consequence today may violate future versions of the rule and result in forfeiture of that status tomorrow.

The Administration has also failed to provide job creators with any meaningful standard in the rule for determining whether a potential change in their health insurance would result in the forfeiture of grandfathered status. Instead, the IFR sets forth two standards: "significant" for those changes that will disqualify a plan from grandfathered status,<sup>231</sup> and "reasonable" for those changes that are deemed permissible.<sup>232</sup> Not only does the IFR leave these terms undefined, but the legal significance of these standards is questionable.

The "significant" and "reasonable" language can only be found in the rule's preamble. It is neither included in Section 1251 of the PPACA, nor in the text of the IFR. This is problematic because the only legally binding material is the regulation's text itself, not the preamble. The rule, therefore, lacks any legally binding standard to determine whether changes in a plan disqualify it from being grandfathered.<sup>233</sup> Without clear standards, job creators will have to

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See John S. Hoff, Heritage Foundation Backgrounder, *Broken Promises: How Obamacare Undercuts Existing Health Insurance* (2011), at <<http://report.heritage.org/bg2516>>.

<sup>226</sup> By contrast, under standard notice and comment rulemaking procedure, a final rule can only be repealed through additional notice and comment rulemaking.

<sup>227</sup> The prohibition on switching insurance providers was lifted by additional interim final rules issued on November 17, 2010. See Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 70114 (Nov. 17, 2010) (to be codified at 45 C.F.R. pt. 147).

<sup>228</sup> Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538; 34,545 (June 17, 2010).

<sup>229</sup> Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 70,114; 70,116 (Nov. 17, 2010).

<sup>230</sup> FAQs have been issued on September 20, October 8, October 12, October 28, and December 22, 2010. U.S. Department of Health and Human Services, Affordable Care Act "Implementation FAQs", viewed September 8, 2011, at <[http://www.hhs.gov/ociio/regulations/implementation\\_faq.html](http://www.hhs.gov/ociio/regulations/implementation_faq.html)>; See also, John S. Hoff, Heritage Foundation Backgrounder, *Broken Promises: How Obamacare Undercuts Existing Health Insurance* 5 (2011), available at <<http://report.heritage.org/bg2516>>.

<sup>231</sup> Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,541 (June 17, 2010) (to be codified at 45 C.F.R. pt. 147).

<sup>232</sup> *Id.*

<sup>233</sup> John S. Hoff, Heritage Foundation Backgrounder, *Broken Promises: How Obamacare Undercuts Existing Health Insurance* 4 (2011), available at <http://report.heritage.org/bg2516>.

navigate the new health insurance jungle with the constant threat of triggering a hidden land mine and inadvertently relinquishing grandfathered status.

### iii. Impact

The IFR, and the manner in which it was issued, has created uncertainty about how to best proceed in a post-PPACA world. This uncertainty effectively prevents employers from negotiating affordable health benefits that their employees prefer, depriving businesses of an effective means of attracting talent and depriving families of more health insurance options. Restaurateur Larry Schuler echoed this concern about regulatory uncertainty before Congress, stating, “The uncertainty of the regulatory process and the many rules that are yet to be clarified and fully defined worry me . . . . Regulatory implementation is moving ahead at full-steam and it seems like a new requirement comes to light every day that is even more burdensome than the last.”<sup>234</sup> Until the final rule is issued, job creators like Mr. Schuler are essentially left to guess which changes will ultimately be deemed permissible and hope for the best.

Further, the IFR restricts the ability of many employers to limit healthcare expenses to compensate for rising costs, such as choosing to offer a less costly plan. According to one news report, “[e]xperts say the new regulations make holding costs down even more of a [sic] challenge for small businesses: If they make changes in their current plans to save money, they risk losing their grandfathered status and will be forced to comply with new mandates that are expected to increase costs.”<sup>235</sup> This is precisely the experience of pre-school franchise owner Gail Johnson. She testified before Congress that rising health care costs caused her to modify her employee insurance plan in a way that passed the heightened cost along to her employees in the form of an added deductible. She explained, “This change resulted in forfeiting our ability to ‘grandfather’ our health insurance plan. Moving forward, our plan must comply with all of the mandates required by PPACA each year as the law is implemented.”<sup>236</sup> Therefore, Ms. Johnson must now decide between providing a mandated health care package to employees that may not prefer it, lowering wages or benefits to compensate for the increased health care costs, reducing her full-time staff to avoid being subject to the employer mandate, or opting to pay the corresponding tax penalty for non-compliance and allow employees to drop into state exchanges.

While the IFR illustrates a broken regulatory process, the impact of the regulation breaks a key presidential promise. According to HHS’s own estimates, 80 percent of small businesses in the country will lose their grandfathered status by 2013.<sup>237</sup> Although just one example, Gail

<sup>234</sup> *True Cost of PPACA: Effects on the Budget and Jobs Hearing Before the H. Comm. on Energy & Commerce*, 112th Congress (Mar. 30, 2011) (written testimony of Larry Schuler, on behalf of the National Restaurant Association at 3).

<sup>235</sup> Judith Messina, *Health Reform’s Grandfathering Rules Likely to Raise Costs*, CRAIN’S NEW YORK BUSINESS, June 23, 2010, <http://www.crainsnewyork.com/article/20100623/SMALLBIZ/100629939>.

<sup>236</sup> *Impact of the Health Care Law on the Economy, Employers, and the Workforce Hearing Before the H. Comm. on Education and the Workforce*, 112th Cong. (2011) (written testimony of Gail Johnson, President/CEO of Rainbow Station, Inc. at 7).

<sup>237</sup> See Judith Messina, *Health Reform’s Grandfathering Rules Likely to Raise Costs*, CRAIN’S NEW YORK BUSINESS, June 23, 2010, available at <<http://www.crainsnewyork.com/article/20100623/SMALLBIZ/100629939>>.

Johnson's assertion that "there remain many hurdles to successfully keeping the health plan our employees like" is similar to the sentiment being echoed across the country.<sup>238</sup>

## VII. CONCLUSION

The examples in this report clearly counter the Administration's claims that they have the regulatory system under control and are engaged in reform. Regulatory agencies are failing to conduct thorough cost-benefit analyses as required by executive order and statute, leading to flawed rulemakings that unnecessarily burden businesses, small and large. Agencies are surpassing congressional intent and upsetting decades of regulatory precedent to push a decidedly partisan agenda. They are skirting the traditional regulatory process, resorting to sue and settle agreements, guidance documents, and interim final rules to avoid the usual notice and comment procedures. As demonstrated in the report, such actions have dangerous ramifications for our economy.

Already, the Federal Register is bursting at over 54,000 pages as the Administration continues to expand its regulatory reach into all facets of business and industry.<sup>239</sup> The rules that make up these pages, in addition to those still in the pipeline, could have untold and profound effects on our economic growth. At a time when private-sector jobs have steadily declined and unemployment remains rampant, the Administration must demonstrate its commitment to the small businesses and job creators who drive our economy. As this report illustrates, the present state of regulatory agencies only undermines the Administration's assertions that the President is serious about reducing the unwarranted regulatory burden on job creators. Until the President can reign in his out-of-control regulators, a broken government will remain.

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<sup>238</sup> *Impact of the Health Care Law on the Economy, Employers, and the Workforce Hearing Before the H. Comm. on Education and the Workforce*, 112th Cong. (2011) (written testimony of Gail Johnson, President/CEO of Rainbow Station, Inc. at 7).

<sup>239</sup> Wayne Crews, *Obama's Anti-Jobs Agenda: Midyear Regulatory Reform Report Card Doesn't Look Good*, WASH. TIMES, Sept. 1, 2011.

June 14, 2011

The Honorable John Boehner  
 Speaker of the House  
 H-232 The Capitol  
 Washington, DC 20515

The Honorable Nancy Pelosi  
 Minority Leader  
 H-204 The Capitol  
 Washington, DC 20515

Dear Mr. Speaker and Mrs. Leader:

On behalf of the members of the animal agriculture producer associations signed below, we ask that you support the language included in the fiscal year 2012 Agriculture Appropriations bill that defunds USDA's effort to promulgate the proposed Grain Inspection, Packers and Stockyards Administration's (GIPSA) competition rule and that you oppose any effort to strike this language during floor consideration of the bill. Our organizations represent hard-working men and women across the country who make their living raising livestock and poultry and producing safe, nutritious protein products. To be successful in this endeavor to feed our nation and the world, we must have the opportunity to enter into marketing or production agreements and other alliances as we choose. The proposed GIPSA competition rule would take those opportunities away.

Recently, 147 members of the House of Representatives sent a letter to Secretary Vilsack asking that the economic analysis of the rule his staff is currently preparing be open for public comment and review before a final GIPSA rule is issued. Secretary Vilsack answered with a firm no. We know that this economic analysis would have a huge impact on the final rule and, therefore, needs to be reviewed and commented on by all stakeholders. Not providing that opportunity shrouds this process in secrecy and does not provide the transparency promised by President Obama. USDA must understand that a transparent process is critical, and this language would deliver the message that the proposed GIPSA rule is detrimental to livestock and poultry producers, the process has not been open, and the current rule must be stopped.

We anticipate an attempt to strike this language during floor consideration of the bill, but this attempt is based on misinformation and is supported by some groups that are not involved in livestock and poultry production. We need to protect America's livestock and poultry producers' ability to sell their cattle, hogs and turkeys on their own terms and not have government dictate their marketing and production agreements.

Thank you for your help and support.

Sincerely,

National Pork Producers  
 Council

National Turkey Federation

National Cattlemen's Beef  
 Association

Arizona Pork Council	The Poultry Federation	Southeastern Livestock Network
California Pork Producers Association	California Poultry Federation	American Hereford Association
Colorado Pork Producers Council	Indiana State Poultry Assoc.	American International Charolais Association
Georgia Pork Producers Association	Iowa Turkey Federation	Certified Angus Beef
Idaho Pork Producers Association	Michigan Allied Poultry Industries	North American Limousin Foundation
Illinois Pork Producers Association	Minnesota Turkey Growers Association	Alabama Cattlemen's Association
Indiana Pork	Broiler & Egg Association of Minnesota	Arizona Cattle Feeders Association
Iowa Pork Producers Association	North Carolina Poultry Federation	Arizona Cattle Growers' Association
Kansas Pork Association	South Carolina Poultry Federation	Arkansas Cattlemen's Association
Kentucky Pork Producers Association	Texas Poultry Federation	California Cattlemen's Association
Louisiana Pork Producers Association	Virginia Poultry Federation	Colorado Cattlemen's Association
Michigan Pork Producers Association		Colorado Livestock Association
Minnesota Pork Producers Association		Florida Cattlemen's Association
Mississippi Pork Producers Association		Georgia Cattlemen's Association
Missouri Pork Producers Association		Hawaii Cattlemen's Council
Montana Pork Producers Council		Idaho Cattle Association
Nebraska Pork Producers Council, Inc.		Indiana Beef Cattle Association
New York Producers Cooperative, Inc.		Iowa Cattlemen's Association
North Carolina Pork Council		Kansas Livestock Association
North Dakota Pork Producers Council		Kentucky Cattlemen's Association
Ohio Pork Producers Council		Michigan Cattlemen's Association
Oklahoma Pork Council		Minnesota State Cattlemen's Assoc.
Oregon Pork Producers Association		Missouri Cattlemen's Association
Pennsylvania Pork Producers Strategic Investment Program		Montana Stockgrowers Association
South Carolina Pork Board		Nebraska Cattlemen
South Dakota Pork Producers Council		Nevada Cattlemen's Association
Texas Pork Producers Association		New Mexico Cattle Growers' Assoc.
Tennessee Pork Producers Association		Ohio Cattlemen's Association
Utah Pork Producers Association		Oklahoma Cattlemen's Association
Virginia Pork Industry Association		Pennsylvania Cattlemen's Association
Wisconsin Pork Producers Association		South Carolina Cattlemen's Association
Wyoming Pork Producers		South Dakota Cattlemen's Association
		Tennessee Cattlemen's Association
		Texas Cattle Feeders Association
		Utah Cattlemen's Association
		Virginia Cattlemen's Association
		Washington Cattle Feeders Association

Chairman ISSA. I will now get past that procedure.

Dr. Graham, I am concerned about something that is not directly related to this, but I am concerned, as Mr. Palmer and others have been, Ms. LeValley, about circumventing the process. Isn't one of the areas that is growing in circumventing sue and settled, not just EPA but throughout government, in which, if you settle a case, you effectively bypass all of the protections that are being complained about not being complied with here today?

Mr. GRAHAM. That is a good question. My experience when I was at OMB at OIRA is that the agencies and the Justice Department are responsible for developing these settlement agreements that commit agencies to doing certain regulations and, in some cases, to doing very specific content of regulation. Those consent decree arrangements do pose a problem for OMB because, in a sense, OMB doesn't have a seat at the table when those consent decrees are signed.

Chairman ISSA. And they are agreed to without scoring, effectively.

Mr. GRAHAM. Well, and there is no cost-benefit analysis to what they are agreeing to, there is no legal analysis as to what they are agreeing to that is independent of the parties who are at that table itself. So it puts OMB in a difficult position then to be having to review independently and objectively a regulation that is emerging from a consent decree process where OMB was not a participant.

Chairman ISSA. Isn't that also true that when agencies do guidance, rather than rulemaking, the same occurs, that implementing that guidance there is no cost-benefit, it is just basically if you don't comply, then the regulatory system can hurt you, while at the same time guidance, although theoretically not compelling, can cost those regulated entities a lot of money?

Mr. GRAHAM. Yes. In the bargaining and game between regulators and OMB, and, of course, that is a daily occurrence in this town, the regulators know that if they do a rule they have to get OMB approval. But if they just issue a policy statement or a guidance or an enforcement suggestion, these types of documents aren't covered by the Executive order, are not typically reviewed by OMB, and are certainly not subject to cost-benefit analysis.

Chairman ISSA. One other question. During your time through OMB, isn't it true that if guidance is implemented, then one of the justifications for rulemaking is it is already being done and, therefore, there is no incremental cost? Isn't that so to the other part of the backdoor, that often compliance to a guidance mitigates the cost and then it makes it easier to go to OMB for rulemaking after the fact?

Mr. GRAHAM. Certainly the agency can say we have our foot in the door, we already have this experience with this, we are just trying to make it mandatory now, since we are already doing it through guidance, supposedly. But in a lot of cases the guidance is itself de facto mandatory because there is an enforcement arm behind it.

Chairman ISSA. Lord knows that if the FDA suggests something and you have drugs pending, it is pretty hard not to take their suggestion.



Dr. Graham, I am going to note Ms. LeValley's statement and predicament. During your time in government, if you found that there was a circumvention of a cost-benefit, in other words, something cost a lot more than \$100 million, perhaps much more than a billion, it is discovered after the fact and then a cabinet says, well, too bad, we are not going back to look at it. Although you were powerless to absolutely stop that, what would have been the position of any previous administration when you discover that less than \$100 million has become more than a billion and it wasn't taken into consideration?

Dr. Graham? Ms. LeValley has told us pretty well that what is happening to her, but would this have happened in any previous administration that you know of?

Mr. GRAHAM. I really don't know, but it is a situation that is of concern, without doubt.

Chairman ISSA. Okay.

Mr. Barker, I am not necessarily a fan of your particular advocacy, but I do have an interesting question for you. Has there been any finding behind this that any of the reptiles that you have produced have ever caused any damage for which this proposed rule would be a cure?

Mr. BARKER. No.

Chairman ISSA. Okay.

Mr. BARKER. It wouldn't. The animals are widespread; they are found in 49 States in the United States. They are held by more than a million American citizens. The Lacey Act won't—the problem is a State problem that exists only in Southern Florida, and this is an inappropriate law that will have no effect whatsoever.

Chairman ISSA. If I had more time, I would have more questions.

With that, I recognize the ranking member.

Mr. CUMMINGS. I want to pick up exactly where the chairman left off. Mr. Barker, you agree with the U.S. Association of Reptile Keepers who opposes the proposed rule for the Fish and Wildlife Service that bans the import and export of some dangerous snakes, is that correct?

Mr. BARKER. Yes, sir.

Mr. CUMMINGS. And you raised your concerns during the formal notice and comment period, again, at an OIRA meeting, did you not? Did you do that? Have you raised these objections before?

Mr. BARKER. Yes, in the public comment period, yes.

Mr. CUMMINGS. That is right.

I ask unanimous consent that this letter of September 13th directed to the chairman from 14 organizations, including the Audubon Society of Florida, be admitted into the record.

Chairman ISSA. Without objection.

Mr. CUMMINGS. Thank you very much.

[The information referred to follows:]

**Audubon of Florida · 1000 Friends of Florida · Florida Wildlife Federation  
The Nature Conservancy · Everglades Foundation · Everglades Trust  
Humane Society of the United States · Friends of the Florida Panther Refuge  
National Parks Conservation Association · Collier County Audubon Society  
Audubon of Southwest Florida · Tropical Audubon Society · South Florida Audubon Society  
Sanibel-Captiva Audubon Society**

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September 13, 2011

Representative Darrell E. Issa, Chair  
US House Committee on Oversight and Government Reform

Re: Committee Hearing "How a Broken Process Leads to Flawed Regulations"

Dear Mr. Chairman:

We understand that in the course of your hearing tomorrow, "How a Broken Process Leads to Flawed Regulations," you will hear testimony from regulated interests on the "injurious" listing of wildlife under the Lacey Act. Our organizations strongly support the listing of boa constrictor, four python species and four anaconda species as "injurious" for the following reasons.

In the Everglades ecosystem, Burmese pythons are already well established, and pose a significant threat to native, imperiled species. Monitoring has shown that state and federally threatened and endangered species, including the Wood Stork and Key Largo woodrat, are already being preyed upon by these large constrictors. Because these predatory snakes are cryptic, highly productive and can take advantage of difficult-to-access aquatic habitats, eradication is difficult and expensive. Despite all our efforts, we may never truly eliminate Burmese pythons from South Florida's wildlands. Meaningful source control is the only effective means of protecting our natural areas from these species, stemming additional releases of Burmese pythons and preventing the establishment of other large constrictors in the wild. Listing these species "injurious" under the Lacey Act is a proactive, coordinated effort by the federal government to control importation and interstate transport of these dangerous species.

In addition to their deleterious ecological impacts, these species pose a significant financial burden to Florida. The cost of eradication efforts on public lands are borne by taxpayers, and to date, the State of Florida has not been able to appropriate sufficient funding to ensure eradication or even halting the spread of these species. Traditionally, state invasive exotic eradication funding has been directed at invasive plants, and even this funding has been reduced by as much as 70% in some agencies, due to diminished tax revenues. Additional public funds may be required to recover native species impacted by these invasive constrictors, and private landowners face long-term financial hardship if eradication and management measures become necessary on their own properties. The US Fish and Wildlife Service (FWS) has already had to fund projects to detect and control Burmese pythons in order to protect endangered species pursuant to the Endangered Species Act; similar expenses may become necessary as these and other species spread. The cost of the FWS inaction, if it fails to list these species as injurious under the Lacey Act, would be significant and ongoing to the State of Florida and its citizens.

In aid of our state wildlife agency, the 2010 Florida Legislature passed legislation banning the ownership, breeding and sale of giant pythons, anacondas and Nile monitors as pets, with reasonable provisions for current owners to retain their pets for the life of the animals, and permitting possession for research or zoological institutions. While these efforts at the state level are critical, we recognize that they come far too late to address the issue of the Burmese python in Florida.

Florida's experience demonstrates that states would benefit from federal leadership on this issue to ensure injurious species are restricted in a timely way before they become firmly established. Similarly, injurious status will be an important companion protection to Florida's state rules, appropriately governing the federal realms of import and interstate commerce.

Thank you for your consideration of this important issue.

Respectfully,

Eric Draper  
Executive Director  
Audubon of Florida

Charles Pattison, AICP  
Executive Director  
1000 Friends of Florida

Manley Fuller  
President  
Florida Wildlife Federation

Doria Gordon  
Acting Director of Conservation  
The Nature Conservancy, Florida Chapter

Kirk Fordham  
Chief Executive Officer  
Everglades Foundation

Mimi Brody  
Director of Federal Affairs  
Humane Society of the United States

Lisa Ostberg  
President  
Friends of the Florida Panther Refuge

John Adornato, III  
Sun Coast Regional Director  
National Parks Conservation Association

Alan Keller  
President  
Collier County Audubon Society

Sarah Larsen  
President  
Audubon of Southwest Florida

Laura Reynolds  
Executive Director  
Tropical Audubon Society

Doug Young  
President  
South Florida Audubon Society

James Griffith  
President  
Sanibel Captiva Audubon Society

The Everglades Trust

Cc: Rep. Elijah Cummings, Ranking Member  
Rep. Dennis Ross, FL-12  
Rep. Connie Mack, FL-14  
Rep. John Mica, FL-07

Mr. CUMMINGS. Did you realize that there are organizations from Florida in the Everglades that are begging for these regulations? And let me just quote this letter. And, by the way, it is from the Audubon Society of Florida, Florida Wildlife Federation, Everglades Foundation, and I could go on and on. But it says, "Florida's experience demonstrates that States would benefit from Federal leadership on this issue to ensure injurious species are restricted in a timely way before they become firmly established. Similar injurious status would be an important companion protection to Florida State rules appropriately govern the Federal realms of import and interstate commerce."

Are you familiar with that?

Mr. BARKER. Yes, sir.

Mr. CUMMINGS. The only reason I am raising this—first of all, I sympathize with you. I understand; I ran a business. I understand your concern about the welfare of your wife and your family. But I want to make sure that we understand there is another side to this. There are other people that are from your area who have an opposing view and they are very adamant.

Ms. LeValley, according to your testimony, you have concerns about USDA's proposed rule to increase competition in the meat packaging market and you testified before the USDA in a public panel, did you not?

Ms. LEVALLEY. I did.

Mr. CUMMINGS. An essential component of a fair and working regulatory process is that those who are impacted by a proposal have an opportunity to explain their concerns to the rulemaking body, that is, the notice and comment period.

You both had an opportunity to voice your concerns and neither of the two rules you address is final; they are both still in the midst of the rulemaking process, and I want to direct your attention to a letter which I ask be admitted to the record, dated September 13, 2011, addressed to the chairman, and it is from about 15 organizations, including the Campaign for Contract Agriculture Reform. I ask that it be admitted into the record.

Chairman ISSA. Without objection.

[The information referred to follows:]

September 13, 2011

The Honorable Darrell Issa  
Chairman, House Committee on Oversight & Government Reform

The Honorable Elijah Cummings  
Ranking Member, House Committee on Oversight & Government Reform

RE: September 14, 2011 Hearing on the Regulatory Process / GIPSA Proposed Rule

Dear Chairman Issa and Ranking Member Cummings:

We are writing this letter with regard to the inclusion of the USDA Grain Inspection Packers & Stockyards Administration (GIPSA) Proposed Rule for consideration in the September 14, 2011 Hearing of the House Committee on Oversight and Government Reform on the regulatory process. Our letter addresses both the process of rulemaking for this proposed rule and additional comments on some major issues addressed by the GIPSA Proposed Rule.

*1. The regulatory process for the GIPSA Proposed Rule, whose implementation was directed by Congress in the 2008 Farm Bill, has exceeded requirements of fairness, full opportunity for public comment, and thorough agency consideration of submitted comments.*

As directed by Congress in the 2008 Farm Bill and using its authority under the Packers & Stockyards Act, USDA published a proposed rule in the Federal Register of June 22, 2010 (75 Fed. Reg. 35338) with ***the following critically needed measures for our nation's farmers and ranchers:***

- Prohibit retaliation by packers, swine contractors or poultry companies against farmers for speaking about the problems within industry, joining with other farmers to voice their concerns to seek improvements, or raising these concerns with federal officials. Currently, many farmers are often retaliated against economically for exercising these legal rights.
- Provide contract growers with commonsense protections when making expensive investments in facilities on their farms to meet packer or poultry company requirements;
- Provide growers and ranchers with access to the information necessary to make wise business decisions regarding their operations;
- Require transparency and eliminate deception in the way packers, swine contractors and poultry companies pay farmers;

- Eliminate collusion among packers in auction markets;
- Provide clarity about the types of industry practices the agency considers unfair, unjustly discriminatory, or a granting of unreasonable preference or advantage. These are all terms used in the existing statute to prevent unfair trade practices, but these broad terms have never been defined in regulations.
- Enable regulators to identify unfair trade practices under the Act by expressly allowing premiums to be paid to livestock producers who produce a premium product, but also requiring meatpackers or swine contractors to keep records to detail why they provide certain pricing and contract terms to certain producers.
- Reduce litigation in the industry by eliminating the ambiguity in interpretation of the terms of the Packers and Stockyards Act. Such ambiguity leads to litigation as farmers and packers seek court action to clarify the intent of the Act.

Prior to issuing the proposed rule, USDA held numerous meetings with all parties with an interest in the Proposed Rule. After issuing the proposed rule, USDA took the step of extending the comment period to 120-days, an extraordinary time for a regulatory comment period. The comment period on the Proposed Rule closed on November 22, 2011. Over 60,000 comments were submitted on the proposed rule, including numerous detailed comments addressing the potential economic benefits and costs of the Proposed Rule. USDA also responded to the request of livestock and poultry packers and processors to assign the USDA Chief Economist to oversee preparation of the comprehensive economic analysis of the GIPSA final rule. To date, USDA has taken almost ten months in its review of the public comments. The regulatory process for the GIPSA Proposed Rule has been lengthy, thorough, open and even-handed.

*2. GIPSA's authority and responsibility to address the full scope of subject matter covered in the Proposed Rule is amply supported and justified by the letter and intent of the Packers and Stockyards Act, as amended, and by well-established principles of federal administrative law enunciated by the Supreme Court of the United States and other federal courts.*

In the 2008 Farm Bill, Congress directed USDA to undertake rulemaking to clarify terms in the Packers & Stockyards Act. A primary concern of Congress in this directive is that USDA spell out criteria that should be used by the agency and the courts in applying the Act's protections for farmers and ranchers against "unfair, unjustly discriminatory, or deceptive practice[s] or device[s], without a necessity of showing that such conduct has an impact on the broader market. In the absence of regulatory guidance, some federal courts have fashioned their own requirement that a farmer or rancher who can prove harm from an unfair, unjustly discriminatory, or deceptive practice must also demonstrate that this individual harm results in a "competitive injury" to an entire market. This formidable judge-fashioned burden is not required by the language or intent of the Act. In addition, USDA has a long-held, consistent position in amicus briefs to the federal courts that the Packers and Stockyards Act does not require this competitive injury showing. More than

90 years after enactment of the Packers and Stockyards Act of 1921, it is imperative that USDA implement regulations to provide clarity to the meaning of the Act for farmers and ranchers, packers and processors, and the federal courts. This increased clarity will serve to decrease litigation.

*3. The GIPSA Proposed Rule maintains opportunities for marketing premiums and mutually beneficial contract arrangements between packers and processors and farmers and ranchers.*

Nothing in the GIPSA Proposed Rule would reduce or eliminate premium-type programs such as Certified Angus Beef, U.S. Premium Beef, “naturally raised” and others. As noted by Dr. Daryll E. Ray, Director of the University of Tennessee’s Agricultural Policy Analysis Center, in two September 2011 articles attached to this letter, rather than eliminating these programs that allow producers to earn a premium price for their products, the GIPSA proposed rule is designed to ensure that packers offer these premiums to all producers who can provide the volume, kind, and quality of livestock required by the company, either individually or collectively. See Daryll E. Ray & Harwood D. Schaffer, *GIPSA: Does Discriminatory Behavior Include Issues of Unequal Access*, Policy Pennings No. 580 (Sept. 2011) (<http://agpolicy.org/weekpdf/580.pdf>) and Daryll E. Ray & Harwood D. Schaffer, *Negative Reaction to GIPSA Rule May Actually Reinforce Its Justification*, Policy Pennings No. 581 (Sept. 2011) (<http://agpolicy.org/weekpdf/581/pdf>). This measure is critical to ensuring that farmers and ranchers have open and transparent markets for their livestock.

The GIPSA proposed rule does require that packers and processors document the requirements for these premiums. But such documentation is sound business practice, not an additional burden to business. Clarification of the basis for premiums can also reduce the possibility of litigation based on discrimination, deception, or undue preferences because farmers and ranchers will have the information and fair opportunity to access specialty markets and niche markets which can command premium prices.

We also note that a 2010 study issued by the American Meat Institute concludes the GIPSA rule would increase consumer meat prices and reduce jobs, resulting in a cost of \$14 billion. However, the entire study assumes that meatpackers would collude to cease procuring livestock through any type of procurement method other than the “cash” or “spot” market.

With no rational basis, and only the unsubstantiated assertion that the GIPSA rule creates a disincentive for packers to use any other method than the cash or spot market to procure their cattle, the AMI study predicts that the GIPSA rule would impose exaggerated costs on the market for livestock products. But, to arrive at its exaggerated costs, AMI “shocked” its demand model with a price change that reflects the outcome that would occur if all the meatpackers colluded to carry out AMI’s threat to abandon all forms of cattle procurement methods other than the cash or spot market.

In his article, Dr. Ray sees right through the faulty reasoning used by the meatpackers and their allies to derail the GIPSA rule and Congress should too. The GIPSA rule imparts

fairness into the meatpackers' livestock procurement practices and does not, in any way, limit the meatpackers' ability to continue using forward contracts and marketing agreements to procure their livestock.

The only harm the meatpackers and their allies can extract from the GIPSA rule is an unsubstantiated and fictitious harm that would only arise if the meatpackers used their current concentrated market power to collude in a scheme to relegate the livestock market to nothing other than a cash or spot market.

Clearly, the GIPSA rule does not do this.

In conclusion, we urge Congress to allow USDA to move forward expeditiously to implement a final rule that will strengthen and clarify the Packers & Stockyards Act with commonsense protections for farmers and ranchers. We urge you to stand with our nation's farmers, ranchers, growers and consumers to oppose the efforts of meatpacker and poultry special interests to insulate themselves from federal scrutiny of their anti-competitive behavior and unfair treatment of farmers and ranchers. As a measure of support for the issuance of a GIPSA final rule, we have attached to our letter an August 3, 2011 letter from 190 groups submitted to the Senate in support of finalizing the GIPSA proposed rule. These groups include represent thousands of farmers, ranchers, and consumers from around the nation.

Sincerely,

Campaign for Contract Agriculture Reform  
 Center for Rural Affairs  
 Dakota Resource Council  
 Dakota Rural Action  
 Food & Water Watch  
 Idaho Rural Council  
 Missouri Rural Crisis Center  
 National Family Farm Coalition  
 National Sustainable Agriculture Coalition  
 Organization for Competitive Markets  
 National Farmers Union  
 Powder River Basin Resource Council  
 Ranchers-Cattlemen Action Legal Fund – USA (R-CALF USA)  
 Rural Advancement Foundation – International  
 Western Organization of Resource Councils



Mr. CUMMINGS. Let me just read from this letter. Again, these are people who are not here. I want to make sure that their voices are heard, and they refer to 191 others who have the same opinion. It says, "in conclusion, we urge Congress to allow USDA to move forward expeditiously to implement a final rule that will strengthen and clarify the packers and stockyard acts with commonsense protections for farmers and ranchers. We urge you to stand with our Nation's farmers, ranchers, growers, and consumers to oppose the efforts of meat packer and poultry special interests to insulate themselves from Federal scrutiny of their anti-competitive behavior and unfair treatment of farmers and ranchers. As a measure of support for the issuance of the GIPSA rule," listen to this, "we have attached to our letter an August 3, 2011 letter from 190 groups submitted to the Senate in support of finalizing the GIPSA proposed rule. These groups represent thousands of farmers, ranchers and consumers from around the Nation."

Again, I just want to make sure that there is another voice here. There are some other folks that have a different view than what you have.

Mr. Arkush, the title of today's hearing is, "How a Broken Process Leads to Flawed Regulations." One of the things that I am concerned about, and you heard me say this in my opening statement, I have not heard too much here this morning so far that even if you get rid of the rules that that creates jobs. So do you hollow out a system, take away the regulations, take away the protections, businesses make more money, poverty goes up, income goes down for employees, regulations out of the window, and what is the guarantee that we get jobs? And if we don't know what either of these two final rules—by the way, this is the end of my question real quick—if we don't know what either of these two final rules will look like, can we responsibly conclude that the process is broken or the regulations are flawed?

Mr. Arkush.

Mr. ARKUSH. You are correct, there is no evidence, empirical evidence that deregulation or a lack of regulation creates jobs. To the contrary, there is some evidence that regulations can create jobs and there is overwhelming evidence, particularly from the financial crisis, that is the big example that jumps out, that a lack of regulation can be devastating to the economy.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Chairman ISSA. I thank the gentleman.

We now go to the gentleman from Utah, Mr. Chaffetz, for 5 minutes.

Mr. CHAFFETZ. Thank you, Mr. Chairman, and thank you for holding this hearing; it is vitally important.

I appreciate all of you who have traveled here to be here and to testify.

Mr. Palmer, I would like to direct my questions to you, and I just want to make sure I have this right. You had Northwest and Delta, great airlines, merging together, a move that was widely applauded as necessary in strengthening the airline industry and bringing together two great organizations. That happened in October 2008. In September 2009 the AFL-CIO, in this letter that I have here and that I would ask unanimous consent to insert into the record—I am

sure that will be okay with the chairman if we insert this into the record.

Chairman ISSA. I am sorry. Without objection.

Mr. CHAFFETZ. Thank you.

[The information referred to follows:]

Attachment 1



September 2, 2009

**VIA FAX AND COURIER**

The Honorable Elizabeth Dougherty  
Chairman  
National Mediation Board  
1301 K Street, NW  
Suite 250  
Washington, DC 20005

The Honorable Harry Hoglander  
Member  
National Mediation Board  
1301 K Street, NW  
Suite 250  
Washington, DC 20005

The Honorable Linda Puchala  
Member  
National Mediation Board  
1301 K Street, NW  
Suite 250  
Washington, DC 20005

Re: Revisions to Representation Manual

Dear Chairman Dougherty and Members Hoglander and Puchala:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), and its 32 affiliated unions<sup>1</sup>, we are writing to request that the National Mediation Board ("Board" or NMB) amend its Representation Manual to allow employees to more effectively exercise their statutory right to designate bargaining representatives under the Railway Labor Act ("the Act" or RLA). Specifically, we are asking the Board to change its election procedures to allow employees to choose union representation when a majority of those voting express support for a union as opposed to treating all workers who did not vote as "no" votes for purposes of representation. For reasons stated below, this requested change is consistent with the statute and is urgently needed to ensure that the representation duties of the Board are carried out in a fair and just manner.

<sup>1</sup> Attached is a complete list of TTD affiliated unions.

Transportation Trades Department, AFL-CIO

808 16th Street, NW • Suite 630 • Washington, DC 20006 • tel: 202.628.9262 • fax: 202.628.0391 • [www.ttd.org](http://www.ttd.org)  
Edward Wyllind, President • Patricia Friend, Secretary-Treasurer

cc: [redacted]

The Honorable Elizabeth Dougherty  
The Honorable Harry Heglander  
The Honorable Linda Puchala  
September 2, 2009  
Page 2

The unions that belong to the TTD represent hundreds of thousands of employees working in all segments of transportation, including the airline and railroad industries. In theory, these workers all enjoy the right to bargain collectively through freely chosen representatives, whether they are covered by the RLA, the National Labor Relations Act (NLRA), or other labor relations laws. In practice, however, those workers subject to the RLA are uniquely and substantially disadvantaged whenever they attempt to choose union representation in an NMB-conducted election.

Specifically, when secret ballot elections are conducted under the NLRA, the affected employees win collective bargaining representation based on a majority of valid votes cast. This is the fundamental principle followed in fair and democratic elections for political office throughout this country. By contrast, workers seeking union representation in NMB elections are denied the representative they want if a majority of the unit does not vote in the election. Even when 100 percent of the voters choose a union, workers are denied their bargaining representative unless an *absolute majority* of eligible voters cast votes for representation. No where in American democracy -- other than during a union election in the airline and railroad industry -- does an eligible voter wishing to sit out an election have his or her silence tabulated as a *NO* vote by virtue of non-participation. Permitting such a vote-by-silence or inaction obviously sabotages the expressed will of the voting majority and creates a perverse incentive for vote-suppression efforts by employers.

This peculiar NMB practice is not required by the RLA (indeed, the relevant provisions of the RLA and the NLRA use substantially the same language). And the NMB's policy is clearly inconsistent with the longstanding, widely accepted understanding of a democratic election process in the public arena. Accordingly, we respectfully ask the NMB to revise its Representation Manual to provide for certification of the representative designated by a majority of valid votes cast in an NMB election, in conformity with the accepted standard for fair and democratic elections.

Although the procedural guidance and policies set forth in the NMB Representation Manual are not subject to the Administrative Procedure Act, we recognize that the Board has followed a practice of inviting and considering written comments from the public regarding proposed changes. We believe such an approach is appropriate in this matter and would therefore urge the Board to expeditiously release a proposal consistent with our recommendations and seek the views of interested parties and stakeholders.

We look forward to the opportunity to provide further input in support of these proposed changes. Thank you for your consideration of our views.

Sincerely,  
  
Edward Wykiel  
President

## **TTD MEMBER UNIONS**

*The following labor organizations are members of and represented by the TTD:*

*Air Line Pilots Association (ALPA)  
 Amalgamated Transit Union (ATU)  
 American Federation of State, County and Municipal Employees (AFSCME)  
 American Federation of Teachers (AFT)  
 Association of Flight Attendants-CWA (AFA-CWA)  
 American Train Dispatchers Association (ATDA)  
 Brotherhood of Railroad Signalmen (BRS)  
 Communications Workers of America (CWA)  
 International Association of Fire Fighters (IAFF)  
 International Association of Machinists and Aerospace Workers (IAM)  
 International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)  
 International Brotherhood of Electrical Workers (IBEW)  
 International Federation of Professional and Technical Engineers (IFPTE)  
 International Longshoremen's Association (ILA)  
 International Longshore and Warehouse Union (ILWU)  
 International Organization of Masters, Mates & Pilots, ILM (MM&P)  
 International Union of Operating Engineers (IUOE)  
 Laborers' International Union of North America (LIUNA)  
 Marine Engineers' Beneficial Association (MEBA)  
 National Air Traffic Controllers Association (NATCA)  
 National Association of Letter Carriers (NALC)  
 National Conference of Firemen and Oilers, SEIU (NCFEO, SEIU)  
 National Federation of Public and Private Employees (NFOPAPE)  
 Office and Professional Employees International Union (OPEIU)  
 Professional Aviation Safety Specialists (PASS)  
 Sailors' Union of the Pacific (SUP)  
 Sheet Metal Workers International Association (SMWIA)  
 Transportation - Communications International Union (TCU)  
 Transport Workers Union of America (TWU)  
 United Mine Workers of America (UMWA)  
 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,  
 Allied Industrial and Service Workers International Union (USW)  
 United Transportation Union (UTU)*

Mr. CHAFFETZ. The AFL-CIO sent a letter to the National Mediation Board suggesting a rule change, that after 75 years, 75 years of precedent, that they wanted to have these rules changed. My understanding is that now 3 years, 3 years into this merger, there still has not been a resolution.

Mr. PALMER. There has not.

Mr. CHAFFETZ. So here you have a very large industry, roughly \$731 billion into our economy, transporting 50 tons a day in cargo, nearly 2 million people per day, there is this assertion that, well, maybe this doesn't have an effect. As the ranking member was saying, well, it doesn't have any effect. It does have an effect. My understanding is here, according to a CNN article, "On average, non-unionized Delta flight attendants take home 12 percent more than their non-unionized Northwest counterparts based on a typical 75 hour a month schedule, they enjoy more generous profitsharing and retirement matches from the company, and they don't have to dole out \$43 a month to union dues."

Now, Mr. Palmer, you don't strike me as an overtly politically engaged person who is just here with partisan lenses on to extol the Republican—my sense of it is that you are just looking at this objectively and that you want to say to your colleagues and to this body, to the Congress as a whole, we want a resolution to this. Am I overstating that or is that—

Mr. PALMER. You are not. I would respectfully disagree with Mr. Cummings that it doesn't affect us. I will bring it down from the numbers that you talked about. There is approximately 21,000 Delta flight attendants, and it affects every one of us every day. When you get on a Delta flight, you are going to get great service, but you are going to get great service from a Northwest crew or a Delta crew. Although our company is merged, we are not. So the CNN poll I am not familiar with, but I do know that on every level Delta flight attendants are paid more per hour, according to seniority; our per diem and other rates are higher. So we are doing the same job, we are going to the same destinations, but because we are in laboratory conditions and because the NMB and the AFA are still messing around with our careers, Delta is not able to merge us fully, so there are at least 7,000, perhaps 8,000 of the premerger Northwest this affects every day.

Mr. CHAFFETZ. And what does that do to the morale and the atmosphere and the working conditions? When you are right next to somebody who is exactly the same, and let's pretend they are exactly the same in every way, what does that do to the working conditions there?

Mr. PALMER. The morale is certainly an issue because, first of all, as I said in my testimony earlier, I began at Delta in 2008. I was in training when that vote happened so, according to the rules, I was unable to vote in it. So practically my whole career I have been in laboratory conditions. There are people who have served through other mergers. Some of the other mergers were probably a little more smooth than this one, but this one is Delta is telling us they are ready to move forward; the AFA is saying, no, we are not going anywhere. Probably the best way I can describe it is non-Delta flight attendants have no voice in this; we can't say we are ready to vote, we can't petition the NMB to vote because we are not a

union, don't want a union. Those at Northwest who were unionized, even though they lost their union last year because they cast their votes not to have it, they don't even have a voice anymore, nor do they have the union. So it is politics and bureaucracy and red tape, and there is absolutely no stability right now with us.

Mr. CHAFFETZ. But my understanding is that you said, I believe, 94 percent of the people did participate in the last vote?

Mr. PALMER. Not only was it 94 percent, but it was 94 percent under the new rules, which were actually more favorable to the unions.

Mr. CHAFFETZ. And what was the result of that vote, with 94 percent voting?

Mr. PALMER. I believe 9,500 out of us voted, 9,544 or so. But the AFA immediately filed interference charges with Delta—or not with Delta, but with the NMB, perceiving that too many people voted, so that their polls were off. They felt they were going to win, but because too many people voted, they were wrong and, thus, there was interference.

Mr. CHAFFETZ. Did you experience any interference?

Mr. PALMER. Absolutely not.

Mr. CHAFFETZ. Thank you, Mr. Chairman; my time is up. I yield back.

Chairman ISSA. I thank the gentleman.

We now go to the gentleman from Massachusetts, Mr. Tierney, for 5 minutes.

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Palmer, you are aware that when we have elections for Governor or for President or for Members of Congress, that the people that stay home and don't vote do not have their votes counted as a no?

Mr. PALMER. I am aware of that, yes.

Mr. TIERNEY. Okay. And that rule that was changed in effect just said that basically when you have a vote in a union situation in your industry, they are not going to count the people that stay home as a no vote anymore, right?

Mr. PALMER. Correct.

Mr. TIERNEY. Okay. Does that seem unreasonable to you?

Mr. PALMER. It doesn't seem unreasonable to me.

Mr. TIERNEY. Thank you. Now, I have seen a motion in a lawsuit against the National Mediation Board that lists Mathew R. Palmer as one of the named parties listed as intervenors in the suit. Is that Mr. Palmer the same person as you are?

Mr. PALMER. I am.

Mr. TIERNEY. And you intervened against the lawsuit against the National Mediation Board.

Mr. PALMER. I did.

Chairman ISSA. Would the gentleman yield for just a question?

Mr. TIERNEY. Yes.

Chairman ISSA. In my opening statement, pursuant to the ranking member's statement, we suggested strongly that we would not ask and have him answer related to the lawsuit because it is something that we would like to avoid this committee getting in the middle of, and I would ask the gentleman to try to agree with the ranking member.

Mr. TIERNEY. If you really wanted to stay out of the middle of it, Mr. Chairman, Mr. Palmer wouldn't be sitting there, all right? So I will make sure that we ask the questions and they don't skirt the lawsuit stuff, but let's be serious about this and not try to put him on there and then claim we can't ask him questions. All right? He is here for a purpose, and let's discuss it.

Now, as I understand it, the plaintiff's lawsuit alleged that two members of the National Mediation Board approached the rule-making with an unalterably closed minds. You echoed that claim in your testimony here today. And while you write that all signs indicate that the world's largest flight attendant union, the AFA, was in backdoor dealings with Board Members Linda Puchala and Harry Hoglander. But the district court judge ruled against you and the other plaintiffs. He stated that the National Mediation Board provided a neutral and rational basis for adopting the rule, and the judge determined that your allegations were insufficient to support even discovery in the issue. You didn't get in the door with it, the judge thought it was so weak. So the litigation is going on right now, correct?

Mr. PALMER. Yes, sir.

Mr. TIERNEY. Okay. The plaintiffs have filed an appeal to the judge's ruling and you are currently scheduled for oral arguments before the D.C. Circuit Court on Monday, is that correct?

Mr. PALMER. That is correct.

Mr. TIERNEY. Now, I am surprised, in that situation, to see Mr. Palmer here at the hearing if you truly want to stay out of the litigation. It seems to me that you are doing just the opposite there, Mr. Chairman. You have been sensitive to this issue before; you were sensitive to it in the Tillman case, you were sensitive to it in the Blackwater employees' case on that. And if you really wanted to be sensitive to it here today, Mr. Palmer would be sitting out in the audience, not at the witness table.

Mr. Palmer, do you have concerns that your participation in this hearing might imply in some way that this committee is trying to support you in your ongoing litigation against the National Mediation Board?

Mr. PALMER. No. I would like to respond to your first question as well.

Mr. TIERNEY. Well, I also—I have limited time to answer the questions, so I would ask you to answer my questions.

Mr. PALMER. I understand that. No—

Mr. TIERNEY. I want to examine your claim that your testimony that the new rules regarding union elections are tilted in favor of unions. We haven't seen any evidence that unions have won any more union elections after the implementation of these new rules. According to the data that the National Mediation Board in this fiscal year, 2011, provided, following the enactment of the rule change, the National Mediation Board has overseen 31 elections and the certification rate for the elections under the new rule is basically the same as it had been for the decade prior, raising by exactly 1 percentage point, from 61.5 percent to 62.5 percent. These elections under the new rules included four elections involving Delta personnel. The unions lost all four of the Delta elections under the new election proceedings.



Mr. Chairman, I just want to wind up my comments saying if Mr. Palmer wasn't supposed to be having this committee look like it was coming down on the side of the plaintiffs in that case, he shouldn't be sitting here. They clearly have lost more elections under the new rules, they have not been adversely impacted on that. Mr. Palmer has a direct interest as a plaintiff in that matter, and I think that this committee should be in the business of not interfering with litigation; we should not be putting these matters on here when they are going on, and it would have been entirely appropriate to leave Mr. Palmer on the bench.

Chairman ISSA. Would the gentleman yield?

Mr. TIERNEY. I yield.

Chairman ISSA. I know we are going to disagree until the end of this hearing. Our view was that job creators and people impacted were coming here to give their opinions about either rules, proposed rules, or other things that they thought was impacting them. We asked Mr. Palmer, and he did so in his opening statement, to limit to his opinion about the effect.

Now, I know you are a baseball fan, so I understand that if they change the size of the strike box it may or may not affect differences, but at least as to the pitchers, they would say their job got easier or harder with a rule change. Mr. Palmer is expressing his opinion about that.

Mr. TIERNEY. Reclaiming my time, Mr. Chairman. You can't convince me that of all of the employees—there were 21,000 employees—Mr. Palmer was the only person that could testify with that point of view and that was necessary to bring a plaintiff in a lawsuit here to testify with 20,999 others available to be the person to sit on that panel.

I yield back.

Chairman ISSA. For the record, my staff indicates that at the tie of his invitation, we were not aware he was an intervenor, but when we became aware we chose to go forward, and I appreciate the gentleman's concern.

With that we go to the gentleman who represents my alma mater, Mr. Walberg.

Mr. WALBERG. And always proud to represent Sienna Heights University. Thank you, Mr. Chairman.

Mr. Palmer, appreciate you being here, and I want to give you an opportunity to answer a question that you did want to answer. All I would say is I appreciate the efforts of Delta and Northwest attendants and crew. You complete every week, at least twice, the object of my grandchildren, and that is to have a safely returned grandfather, because they are the only people in the world who truly adore me. So thank you for doing that.

I am going to ask five questions, at least that is my intention, so if you could keep your answers as brief as possible, but complete as possible. I want to let you end by answering the basic question, any additional points or comments you would like to address. But let me go back.

My Democrat colleagues state that the old rules were undemocratic and the elections were not how we elect government officials. How do you respond to that?

Mr. PALMER. He was partly right. They are democratic, but they are not like we elect you, and they are not like we elect you for several reasons. If you underperform, then your constituents have a right to vote you out in a period of time. Also, your constituents do not pay you dues. As I have written in my testimony as well, besides that, the NLRB, which the NRLA and the NMB wanted to do, there was an equal process to decertify. Once you vote in a union, say Delta or Northwest with AFA, it is for an indefinite term. There is no equal process to go back. There is the convoluted straw man poll that I talked about. You have to get one person out of the 21,000 to be a straw man. We all have to identically sign cards, it has to be 50 percent of us plus one within a year, then hold the election and then hope the person that we are electing to replace the union will actually then step down once and if somehow he wins.

Mr. WALBERG. So you are captured.

Mr. PALMER. Yes. Absolutely. Completely different.

Mr. WALBERG. Assertions have been made that Delta interfered in the election. Did you experience any interference from the company in any way?

Mr. PALMER. I did not.

Mr. WALBERG. Is there any way for Delta to know how a flight attendant voted in the election?

Mr. PALMER. There is not. I also had a Ballot Point. We vote online and by phone, which is another difference. We vote for 5 weeks, we don't vote for 12 hours on 1 day. You have 5 weeks to vote. You can vote online or you can vote by phone. That allegation came up from AFA. I contacted Ballot Point, who coincidentally is who AFA uses for their internal elections at Northwest. They state that they give us a PIN, random PIN and a random password. They store those on two separate servers, so once you log in and then place your PIN, I have an email from them stating that not even their engineers could tell you how you voted. And even if they did tell you how you voted, they would have no clue who that PIN belonged to. So, no.

Mr. WALBERG. So no ballot identification of the voter in any way, shape or form.

Mr. PALMER. No way, shape or form.

Mr. WALBERG. You mentioned that the old rules were consistent with the Railway Labor Act. Can you explain?

Mr. PALMER. I can. The old rule was 50 percent plus one of the majority of the class, so just a round number, with 20,000 flight attendants at Delta, if 10,001 voted, then you would be unionized. They have changed that now to be a minority vote, so if 2,000 vote and 1,001 vote in the affirmative for any union, not even just AFA, now you have a union for the whole group. So it was completely different.

Mr. WALBERG. Has the NMB ever been requested to change the rules before?

Mr. PALMER. Yes, they have. Actually, there have been four times, and probably the most interesting time was under the Carter administration. They had the exact same board, it was a three member board; it was one Republican, two Democrats. They were, I believe, in the mid-1980's and the late 1970's also asked,

and then this last time with the TTD. During the Carter administration, the NMB actually published in their register that they did not believe that they had the right, that it could only go by congressional law. And, again, I reiterate we have two Democrats and one Republican now. During the Carter administration it was the same thing. They refused to change it then; it was refused to be changed in the 1960's and refused to be changed in the 1980's.

Mr. WALBERG. Twenty-seven seconds. Any additional comments or points you would like to make on this issue that you seem extremely passionate about and is very personal?

Mr. PALMER. Well, someone had mentioned earlier about that Americans have the right to know the inherent costs to us with regulations. There are \$516 of dues each year, plus millions over the course of the years for the unions. We have a right to have that money and know what it is going to be used for. With unions we do not.

Mr. WALBERG. Thank you, appreciate your comments.

Chairman ISSA. I thank the gentleman.

We now go to the gentleman from Tennessee, Mr. Cooper, for 5 minutes.

Mr. COOPER. Thank you, Mr. Chairman.

It is very easy, in a hearing like this, to beat up on the executive branch for different problems with regulations. I think Congress needs to remember where the laws come from; that is us. And oftentimes we fail in our responsibilities to pass good laws, so that really makes it harder on the agencies to pass or formulate good regulations. An example I wanted to bring up in particular is the Lacey Act, and I would like to ask the chairman to amend the report that he has already submitted for the record because on page 13 of his document it says the Lacey Act was last amended in 1981. Well, we amended it in 2008; we added plant species to that act. And a Tennessee company recently has suffered greatly as a result of overzealous enforcement of that act.

The law, as written by Congress, included no grandfathering whatsoever, so it literally puts at risk every serious musician in the United States, not just musical instruments, but flooring, all sorts of industries that have to deal with wood products or paper products, things like that. And that was a congressional mistake. I didn't vote for this law. The President actually vetoed it and Congress went to the trouble of overriding the veto. Now, this law was a very small part of a much larger farm bill. That shows the risk that we take when we pass a massive piece of legislation and it is hard to spot the individual components of it.

Another flaw with the law as passed by Congress is it puts our legal fate in this country completely in the hands of foreign law makers in the way they come up with their laws, which is sometimes hard to detect in one of the, what, 220 countries around the world.

So the best way to reform is to start looking in the mirror, and we have a lot of work to do here.

It used to be, years ago, that there were study groups in Congress so that we could actually have a better idea of knowing what we were voting on in advance, before the vote. An earlier speaker, Newt Gingrich, banned those organizations, and that ban has con-

tinued now for a decade or two. So now each one of us has individual staffs that try to keep up with what we are voting on, but it is very difficult for them to do a super-professional job, the way it used to be done. So perhaps this Congress could look into reinstating those organizations, allowing them to form so we could have a much more professional look.

The group that I particularly focused on in the past was called the Democratic Study Group, but, actually, Republicans trusted it so much they subscribed too, because this group did not assume that you would vote with the Democratic party at all; they just wanted to serve up the facts, give you the pro and con, and then let you make up your mind according to what is in the best interest of your country and your folks back home. That sounds a little old fashioned, but wouldn't that be nice, to return to ideas like that so we would actually have a much more solid idea of what we are voting on?

There is a silver lining in this hearing. I think a couple of the witnesses and most folks on this committee realize that Cass Sunstein is a brilliant individual. I wish he had more clout and more visibility. We are going to hear from him in a little bit, but I think he wants to make good things happen to get these cost-benefit analyses right. But it is difficult to reform a process overnight. So hopefully with a little good will, a little patience we can start fixing some of these broken things that have been broken for a long time in this town, and I think Congress should start with itself.

So thank you, Mr. Chairman. I appreciate the opportunity.

Chairman ISSA. Would the gentleman yield?

Mr. COOPER. I would be delighted.

Chairman ISSA. First of all, we take note of the 2008 Act and would ask unanimous consent we be able to revise the document before submission. Second, I appreciate your points, including the unintended consequences to the Qatar industry and a number of others. This committee is cognizant that we have to do review of laws we have passed, and I hope that we continue to remember that many of the regulations that get created do start with ill-prepared legislation. And I will take to note, along with the ranking member, if we can address your concerns on the study committees, because I think there are successor study committees, but I would like to know more about what you would like to see and we will work on that.

Thank you, gentleman.

We now go to the other gentleman from Tennessee, Mr. DesJarlais.

Mr. DESJARLAIS. Thank you, Mr. Chairman, and thanks to our witnesses for appearing here today.

Mr. Arkush, as I listened to your testimony, it reminded me of a reality TV show that was on, I think, Ashton Kutcher, You Have Been Punked, and before I spend time asking you questions, I want to make sure you weren't punking us today with that testimony. Okay.

Why do you think so many of our companies are going overseas to create their businesses?

Mr. ARKUSH. Oh. Well, I am certainly not a multinational corporation myself, so I don't have a lot of personal insight into that. I think a lot of factors go into decisions like that.

Mr. DESJARLAIS. Okay. Have you ever worked for the Office of Management and Budget?

Mr. ARKUSH. No, I haven't.

Mr. DESJARLAIS. Office of Information and Regulator Affairs?

Mr. ARKUSH. No, I haven't.

Mr. DESJARLAIS. Have you ever headed an executive or independent agency?

Mr. ARKUSH. No, I have not.

Mr. DESJARLAIS. Owned or operated your own small business?

Mr. ARKUSH. That is a close call.

Mr. DESJARLAIS. Okay. As part of the job creators tour, I have traveled through Tennessee and visited, oh, thirty-plus factories and businesses and asked them what was standing in the way of job creation, and their opinion is a little different than yours. Probably the number one answer I get is that we need to get government out of the way, and EPA comes up quite often. So clearly their opinion of regulations differs from yours. Do you think that all regulations are good?

Mr. ARKUSH. Oh no, of course not. Anyone can make mistakes, and that is true of the government as well. And on the note of what small businesses think, there have been some interesting surveys recently that have shown that the number one concern of small businesses is poor sales. The concern is there won't be enough demand for their products; it is not government regulation.

Mr. DESJARLAIS. Just to get this straight, I think you had said that one of the biggest problems for regulatory agencies is that they are overregulated.

Mr. ARKUSH. That is right.

Mr. DESJARLAIS. Okay. I wanted to make sure I heard that correctly. Doesn't that in itself suggest that the bureaucrats here in Washington are doing a poor job in terms of overregulating?

Mr. ARKUSH. It suggests to me the contrary; it is that even when there is a commonsense rule that they want to write, that everyone agrees on—sometimes industry wants rules; sometimes industry and labor get together and they say to an agency we need a new rule here. Even in those instances it is too hard and it takes too long to write a simple noncontroversial rule, because there are so many administrative burdens on these agencies.

Mr. DESJARLAIS. I hear a lot of numbers thrown around out there what regulations cost employers. I have heard anywhere from \$9,000 to \$12,000 per employee just the sheer number of regulations. Is that a number that sounds about right?

Mr. ARKUSH. No, it sounds wrong to me.

Mr. DESJARLAIS. Okay. Do you have a number?

Mr. ARKUSH. Well, I think that number is derived from this study by these economists Crane and Crane. They said that regulations cost the economy \$1.75 trillion a year. That study has been thoroughly discredited. It had an incomplete data set, it had a flawed methodology; it only looked at costs of regulations, it didn't look at benefits. If we looked at everything that way, we wouldn't

buy food. I would say, well, my grocery bill is a little high, that is \$50 a week, that is a big cost.

Mr. DESJARLAIS. I don't disagree. Some regulations are good. I am not trying to sound like I am anti-regulation. But what I am hearing in the real world from real job creators is that we need to get government out of their way and they are overburdened. So I appreciate your testimony and being a good sport.

Mr. ARKUSH. I do have one real world personal response to some of this and the Lacey Act concerns. Actually, the way in which I have a small business is I am a musician and I actually work in a band; we play weddings and bar mitzvahs, if you have anyone.

Chairman ISSA. Excuse me, but no soliciting here.

Mr. ARKUSH. I am sorry.

Chairman ISSA. If we let it start with you, we will end up with Pepsi cans sitting on the—

Mr. ARKUSH. With all respect, that was a joke. But I am a guitarist and I don't have concerns about the Lacey Act; it is not a problem for me, it is not a problem for my business.

Mr. DESJARLAIS. I wanted to get to Ms. LeValley for a moment, because clearly you have a great story there. In testimony you indicated that the USDA previously promoted consumer-driven small scale processing operations. Can you expand on how the new rule now restricts your operation?

Ms. LEVALLEY. Certainly. When we go back to the proposed rule, what it says in the proposed language is that it bans packer-to-packer sales. Does not differentiate size or anything. Nor do I believe that differentiating size is an answer by any means. However, what it says is two-thirds of our animals actually are sold directly to a packer. Under this proposed regulation, it says that those packer-to-packer sales are banned. We are a packer. I am a packer, I am a producer, I am a feeder, I am a rancher, and because I am a packer, I now have limitations on who I can actually sell to because I cannot sell the rest of my animals to another packer.

Mr. DESJARLAIS. Okay. The chairman has been quick with the gavel, but I want to just real quickly, if I get my question in, maybe he will let you answer. Is it true that GIPSA agreed to conduct a more rigorous cost-benefit analysis of the rule in response to the stakeholders' concerns?

Ms. LEVALLEY. It is true, and we appreciate that. However, what we would like is that that be open for review and comment. We know that the original economic analysis was flawed. So, again, just as you all have said, 147 of you have written a letter saying that this process should be open for public comment. We want that to be the case, and we have heard that that won't be the case as far as being open for public comment. That review, that cost-benefit analysis should be open for review and public comment.

Mr. DESJARLAIS. Thank you, Ms. LeValley.

I yield back.

Ms. LEVALLEY. Thank you.

Chairman ISSA. I thank the gentleman and the gentlelady.

We now go to the gentleman from Virginia, Mr. Connolly, for 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman. And thank you for allowing me my opening statement; I appreciate it.

Mr. Barker, I listened to your testimony and I have some questions about it, but let me ask. You make reference to the Lacey Act. Am I not correct that the Lacey Act was introduced in 1900 by a Republican Congressman from Iowa and signed into law by a Republican President, William McKinley, to try to—well, its original motivation was to try to protect endangered species that were being more than decimated because of the feather trade in women's hats at the time. Is that not correct?

Mr. BARKER. I am not expert on the history of the Lacey Act. I can't respond, sir.

Mr. CONNOLLY. Well, that act that has been on the books for 111 years, in your view, does it represent burdensome regulation that should be repealed?

Mr. BARKER. Yes. At least in some cases, sir. It is a huge act.

Mr. CONNOLLY. Thank you. You made reference to the USGS study, and I think you said it was very unscientific. This is the study you are referring to?

Mr. BARKER. Yes, 302 pages published in 2009.

Mr. CONNOLLY. Are you aware of the fact that a number of scientists from all over the United States signed a letter praising this study and saying it most certainly is scientific and is relevant and ought to be taken cognizance of as we perform our deliberations? I am referring to a letter you may not have seen, be glad to share with you, to my colleague from Virginia, Bobby Scott, who was then the chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security, on January 20th of last year. This letter is signed by PhDs, usually in botany or biology or natural sciences, from Waldorf College, University of Hawaii, University of Tennessee, Florida Museum of Natural History, University of Massachusetts, Texas Tech, Duke University, Central Lakes College, World of Wildlife Federation, Defenders of Wildlife, Bishop Museum in Hawaii, the Union of Concerned Scientists, and Auburn University. Have you seen that letter from these scientists?

Mr. BARKER. I don't have it with me here, but yes, I have seen the letter. Most of the signatories on it are people who would be identified professionally as invasion species biologists and colleagues of the authors of that paper.

Mr. CONNOLLY. So they are just biased?

Mr. BARKER. Some are graduate students of one of the authors.

Mr. CONNOLLY. Are you familiar with the testimony given in March of last year by the Director of the National Park Service before the House Resources Committee? He said, "The Burmese python is currently well established in South Florida, including Everglades National Park and Big Cypress National Preserve, and a population of boa constrictors is established south of Miami. Additionally, recent evidence strongly suggests a reproducing population of Northern African pythons on the western boundaries of Miami."

He is testifying here that these invasive species, these non-native, exotic species have now in fact established themselves in South Florida. Do you take any issue with that testimony?

Mr. BARKER. There are several issues. One is that the Everglades region of South Florida has more established alien species than any other similar ecosystem in the world. Fully one-third of all plants

and animals that have ever been recorded in that area are established alien species.

Mr. CONNOLLY. Do you believe that the Federal Government has any obligation whatsoever, in concert with the State government of Florida, to try to hold back and if not actually try to improve progress in curbing both the introduction of exotic foreign species that could be dangerous to the habitat and to try to make some progress in curbing the habitat of the Burmese python and other reptiles?

Mr. BARKER. I don't know of anyone who is happy about Burmese pythons existing in the Everglades region of South Florida. It is a problem, but it is a very localized State problem; it is not a Federal problem. Burmese pythons are not going to spread across the United States and strike fear in the hearts of kindergartners everywhere. So in this case I think the Lacey Act is just simply the wrong piece of legislation to invoke.

And I can offer as an example the fact that they are not going to—I disagree with some conclusions in that report and other people support it, but in terms of actual evidence, over the past 20 years a significantly larger number of Burmese pythons were imported into Los Angeles, and there is no established population of the snakes there. They have been maintained in large numbers, by tens of thousands of people across the Southern United States for 30 and 40 years. I got my first one 41 years ago. I don't have any now, but there are no other populations anywhere else in the United States, and I think that Florida has acted very aggressively and very appropriately to handle the problem at the State level, they have done very well. And I will mention that the African rock python that was included in the testimony last year is believed to have been extirpated from the United States now. There were a very small number of animals existing in a huge pile of lumber. The State came in, wood chipped the whole thing, didn't find any more animals; wiped out the thing. No animals have been reported in 12 months, and they are waiting another year to formally declare them as exterminated, but they appear to be gone.

Mr. CONNOLLY. Thank you.

Chairman ISSA. I thank the gentleman.

We now go to the gentleman from Pennsylvania, Mr. Kelly, who is not going to ask questions at this time.

We now go to the gentleman from Texas, Mr. Farenthold, for 5 minutes.

Mr. FARENTHOLD. Thank you, Mr. Chairman. Being a Texas, a big cattle growing State, I wanted to talk to Ms. LeValley for a second about the effort that goes into producing cattle.

The USDA, right now, they grade select, choice and prime, and that affects how much you get for your cattle. Can you tell us a little bit about increasing upon that and creating different markets with specialized product, grass-fed, Angus? I mean, there is some effort that goes into doing that, and the breeds. Can you just give me like a 30, 45 second background there?

Ms. LEVALLEY. Sure. And I appreciate the question. Sixty-two percent, when we look at all of the marketing arrangements in the United States that are incurred by beef cattle producers, are these added value, and the added value is because of the way they are



raised or the way they are processed or the quality, meaning that they are either higher quality, closer to grading choice or prime or that they are meeting a consumer demand. Because they are very specific in how they are raised, the processors and packers have rewarded that individual or that ranch by paying a higher premium price because it is closer to what the consumer wants. So, again, that price differentiation between that and just a straight animal that is not added any value, there is that price differentiation because of the added value, the added cost, and the added benefit, and the consumer has been the one to benefit with the higher quality and greater eating experience.

Mr. FARENTHOLD. So you get more money if you sell it to a gourmet restaurant, as opposed to a fast food restaurant, is a simple way to put that.

Ms. LEVALLEY. Correct.

Mr. FARENTHOLD. All right, so under the GIPSA regulations, tell me what is going to happen to that sort of business model.

Ms. LEVALLEY. Again, when you see the vagueness of the language that you see in the proposed regulation and the potential for increase in litigation, what you have is the opportunity to actually reduce the quality contracts, to reduce the ability to capture that market value, to actually get paid for the added benefit. And, again, increased litigation will have the USDA with the oversight of is this price fair. The USDA will be determining what price is fair, not looking at the differences in the quality of animals or the weight differences or the freight differences, or anything like that. USDA will be providing that oversight. That oversight will actually increase the uncertainty in the market, and when we have increased uncertainty in the market, we have the tendency to go to the lowest common denominator, price, which means there will be a rollback in the prices received for the beef cattle industry because there will be not anyone that takes the chance because of that increased government intervention and increased potential for litigation.

Mr. FARENTHOLD. I can't imagine any industry that would be happy with the government telling them how and what factors have to be taken in to setting their price. That kind of strikes me as going against the fundamental principles this country was founded on.

Now, I take it you are not opposed to all USDA regulation. They need to be in there making sure the packing plants are safe and there are traditional grading methods, maybe even some additional grading methods. Would that be a fair statement?

Ms. LEVALLEY. That would be a fair statement. Every day there is between two and three USDA inspectors in our packing plant every day, and we welcome them, we work with them on all of our plants.

Mr. FARENTHOLD. All right. I appreciate it very much. Is there anything you wanted to add about—are you able to partner well with the USDA? I mean, you work well with them on most things, is that not correct?

Ms. LEVALLEY. We do. We actually do. And, again, we welcome that partnership in our plant. We just do not feel that they need

to be in the pricing business or the setting of pricing business or have the potential for increased litigation and competition.

I would like to just go back to the letter that was referenced that was entered into the record. I want it to be well known that the majority of the group that signed onto that letter that were in support of the GIPSA regulation were non-producer groups and do not represent the majority of the livestock in the country. So I do want that reflected, that even though there was significant numbers, we have 84 producer groups that represent the majority of the livestock that is produced in this country that are opposed to this regulation.

Mr. FARENTHOLD. And what is the good outcome? Who benefits from this regulation? It just seems anti-competitive.

Ms. LEVALLEY. Again, when you look at this and when we look at that there is not a clear cost-benefit analysis completed, it will not be the individual that is out there every day producing the livestock, they will not benefit in any way because, again, the price will be rolled back because no one will want to pay a premium for fear of litigation. So no one, whether it is small, medium, or large, no one benefits from having this increased intervention and government litigation.

Mr. FARENTHOLD. Do you see a consumer benefit? To me, it seems like it would take away choices. Your ability to say, all right, I am going to do organic beef or I am just going to raise Angus cattle or I am going to just do grass-fed cattle. Do you think there is a benefit to consumers there at all?

Ms. LEVALLEY. No. We see a rollback with the consumer choices also in the outcome of this. It is unintended consequences with this GIPSA regulation.

Mr. FARENTHOLD. All right, thank you very much.

I yield back.

Chairman ISSA. I thank the gentleman.

We now go to the gentlelady from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you. Thank you very much, Mr. Chairman.

If I may say, before I ask my question, we are having these regulations just as the country is recovering from an economic debacle that everyone agrees did not come from the usual market forces, but from the failure to regulate. It produced a whole set of regulations, Dodd-Frank, and, by the way, we were saved from a worse debacle because of regulations that were enacted 75 years ago, during the 1930's.

Now, I would like to ask a question about cost-benefit. We know we have had cost-benefit analysis for a very long time, but Mr. Graham makes a very serious charge, that there may be "serious and systematic flaw in the benefit and cost numbers," and even suggests that the regulatory agencies have their thumb on the scales.

Now, I went and asked somebody to bring me the regulations themselves, the regulation at issue itself, Executive Order 13563. It says, in applying these principles, each agency is directed to use the best available techniques to quantify anticipated, present, and future benefits and costs as accurately as possible.

I would like to ask Mr. Arkush are you aware of any basis for this very serious charge, essentially that the agencies are cheating in doing the cost-benefit analysis?

Mr. ARKUSH. Yes and no, but perhaps not in the way that Mr. Graham means it. The agencies might try to cheat, might try to put a thumb on the scale one way or the other. In my view and the view of my organization, when Mr. Graham was heading OIRA, the Bush administration and OIRA were putting a thumb on the scale against measuring benefits adequately. Now, his view, when he is no longer in the government, is that the Obama administration is putting a thumb on the scale the other way.

There are two points here. One is that this just demonstrates how flawed cost-benefit analysis is as a methodology. It is very difficult to measure the costs and the benefits of a lot of very important things in the regulatory process; the value of lives saved, the value of health, the value of clean air, clean water, children's IQ points. And people can disagree intensely on how to measure those things.

One of Dr. Graham's disagreements with the Obama cost-benefit analysis on fuel economy standards is that he thinks he knows better what the price of gasoline is going to be in 10 or 20 years than the Obama administration does. If he knew that, if any of us could know that, we would be far richer than any of us is.

These are serious difficult problems that can't be resolved easily. There are political differences over those problems, and what Graham's testimony shows is when he was in charge of OIRA, he knew how to use his institutional power to require agencies to conform to his views. It doesn't mean that his views are right and it doesn't mean that the Obama administration is wrong.

The second point is it is very difficult for agencies to rig the cost-benefit analysis in the manner that Dr. Graham says. It is hard to overstate benefits because, again, they tend to get understated in the economic analysis; they are hard to value—

Ms. NORTON. Why do they tend to get understated?

Mr. ARKUSH. Because it is so hard to put a price on them. Again, it is hard to value the benefit of saving a life. At the same time, costs frequently are overstated because most of the information that agencies get is from industry. Industry has every incentive to overinflate cost estimates. And we are only looking at the world as it exists today when we look at costs of regulatory compliance. We have no way of factoring in how much compliance costs diminish with new innovations, new efficiencies. Retrospective reviews tend to show that the cost estimates for major regulations were vastly overstated when we look back at them later.

Ms. NORTON. I found another section of the Executive order that welcomes flexible approaches, where relevant and feasible, consistent with regulatory objectives. It says the agency shall identify and consider regulatory approaches that reduce burdens and maintain the flexibility and freedom of choice of the public, and then it gives examples: warnings, disclosure requirements, information to the public. That would seem to suggest that regulations are more flexible than has been alleged.

Thank you.

Mr. LABRADOR [presiding]. Thank you.

Now we will give time to Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Dr. Graham, the phrase cost-benefit analysis sounds impossible to disagree with, much like shared sacrifice and balanced approach and some other phrases we have heard recently. How could one possibly not agree with a cost-benefit analysis? So my question to you is can that analysis be gamed or manipulated? And if so, how?

Mr. GRAHAM. Yes, there are a lot of assumptions and inputs that go into a calculation of cost or benefit, and if you are trying to tell a good story about a regulation, you can try to pick the inputs that make the regulation look good. If you are trying to make the regulation look bad, you can try to pick some that makes it look bad. The key role that OMB OIRA has in this process is to review these cost-benefit analysis and make sure that they are reasonably well done.

Mr. GOWDY. Mr. Arkush, do you agree with one famous law professor by the name of Cass Sunstein, who said expensive regulations may well increase prices, reduce wages, and increase unemployment? Do you agree with him?

Mr. ARKUSH. I am still waiting for Mr. Sunstein to provide the evidence to substantiate that conclusion.

Mr. GOWDY. So you disagree with him. Well, let me go to his boss, President Obama. There are some rules and regulations that put an unnecessary burden on a business. Is the President right or wrong?

Mr. ARKUSH. I don't doubt that we could imagine there might be some, but the President hasn't—

Mr. GOWDY. Can you name one?

Mr. ARKUSH. No.

Mr. GOWDY. Because he said he could come up with 500, 501 if you include his salmon example from the State of the Union.

Mr. ARKUSH. That is right. And the conclusion among consumer groups like mine and the U.S. Chamber of Congress was that the administration didn't find that much. There just aren't that many overly burdensome, unnecessary regulations.

Mr. GOWDY. You can't think of a single solitary rule or regulation that is unnecessary or duplicative?

Mr. ARKUSH. I didn't say I can't think of a single one.

Mr. GOWDY. Well, name one.

Mr. ARKUSH. There are 500 examples that the President—the President, for example, is going to make certain recordkeeping electronic, rather than paper. That is a great idea.

Mr. GOWDY. Is that the only one you can think of?

Mr. ARKUSH. I didn't come here to speak about examples of overly burdensome regulations. When the administration went looking, they found 500 individual ones, but none of them is very significant, and that is what the U.S. Chamber of Commerce thinks, not just me.

Mr. GOWDY. If someone were to say we should have no more regulation than the health, safety, and security of the American people require, do you agree with that or disagree with that as a standard of review for regulations and rules?

Mr. ARKUSH. I think it is a reasonable formulation, but it is a little odd. I don't think that the question is do we have too much

regulation or too little; I think it is whether we have the right regulation.

Mr. GOWDY. Do you know who said that?

Mr. ARKUSH. I believe that might have been the President of the United States.

Mr. GOWDY. It was. Let me ask you with respect to a couple of specific examples. Can you tell me how the health, safety and security of the American people are impacted by the NLRB's new quickie election rules?

Mr. ARKUSH. I am actually not an expert on those rules at all, but I do know that union membership in this country has declined a lot in the last several decades——

Mr. GOWDY. Historic low.

Mr. ARKUSH. Yes, and that it is correlated with poor income distribution; it is correlated——

Mr. GOWDY. So you agree that that rule is calculated solely to drive up union membership? That is what you just said.

Mr. ARKUSH. Absolutely not.

Mr. GOWDY. That is what you just said.

Mr. ARKUSH. I was responding—I was taking for granted—I thought that you were saying it was a pro-union rule, and I was taking that for granted in my answer.

Mr. GOWDY. But you agree that it was calculated solely to drive up union membership.

Mr. ARKUSH. I have no idea. I am not familiar with the rule.

Mr. GOWDY. Can you tell me how the posting of posters informing workers of their right to unionize, but not their right to decertify a union, impacts the health, safety or security of the American public?

Mr. ARKUSH. I believe that all Americans should have adequate knowledge about their rights.

Mr. GOWDY. Including their right to decertify if there are in a union?

Mr. ARKUSH. They should have knowledge of any right that they have. I believe that unions work best when they are dramatic and I believe that workplaces work best when they respect their workers and respect the choice to join unions, if that is what the workers want.

Mr. GOWDY. So you would disagree with and argue against an NLRB rule or regulation that only gave half of a worker's right, the right to unionize, but did not inform them of their right to decertify a union?

Mr. ARKUSH. You know, in the abstract, I don't know much about these rules, but, sure, sounds like they should know about their full rights.

Mr. GOWDY. All right, the redefining of bargaining units, can you tell me how that impacts the healthy, safety, or security of the American public?

Mr. ARKUSH. I don't even know what you mean by the redefining of bargaining units.

Mr. GOWDY. Reconstituting who can vote in union elections and the majority necessary to win. How does that impact the health, safety or security of the American public?

Mr. ARKUSH. I would guess that—again, I don't know, I am not familiar with these rules, but I would guess that whoever put them in place has a pretty well thought out theory on how it helps.

Mr. GOWDY. Could it be raising membership in unions? Could that be the well thought out goal?

Mr. ARKUSH. That might be, and that would actually be a laudable goal if it were.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. LABRADOR. Thank you.

I now recognize the gentleman from New Hampshire.

Mr. GUINTA. No questions.

Mr. LABRADOR. I will take some of this time.

First, Mr. Gowdy, do you have any other questions? Do you need some additional time?

Mr. GOWDY. Mr. Chairman, I think I have exhausted my questions, but thank you for your gracious offer.

Mr. LABRADOR. All right.

Dr. Graham, would you like to respond to Mr. Arkush? He took some issue with some of the things that you were saying in your testimony. I don't know if you took note of those things. If you would take the time to respond to him.

Mr. GRAHAM. Yes, just two factual things for the record. One of his comments was that agencies don't know how to take into account the fact that the costs of regulations sometimes decline over time as industry gets accustomed to them and learns how to comply. But, in fact, some of the agencies, like EPA, build in assumed reductions in costs over time, for example, in compliance with motor vehicle standards. And there are other cases where regulations end up being more costly than anticipated; and, of course, that needs to be part of the understanding as well.

The second thing was my key point on the future of oil prices and gasoline prices. It is certainly not that I know the future of those prices. I would be a very wealthy person if I could know that much. My point is the agency, in good faith analysis, needs to consider the possibility that they might actually stabilize and decline over time as they will continue to rise in the future, and that is due to the slowing of the growth of the Chinese and Indian economy and the growing supplies around the world as new discoveries of oil and new technologies define them are invented. So we just need to take into account both of those possibilities.

Mr. LABRADOR. Okay. Now, as you know and as was already mentioned, last week the President told a joint session of Congress that we should have no more regulation than the health, safety and security of the American people require; every rule should meet that commonsense test. Do you believe Federal regulatory agencies are currently meeting this commonsense test?

Mr. GRAHAM. I think it's a rule-by-rule analysis, and I cited one concrete example, giving special compliance credits for electric cars under the mileage program. It doesn't improve the environment, it doesn't make us any safer; it just allows manufacturers to produce more cars that have lower mileage to offset those. So counting them as zero pollution, when in fact pollution occurs back at the power plant, it doesn't do anything for the health, safety, and the environment of the country.

Mr. LABRADOR. Okay. How would you suggest that we solve this problem? How can we get to—do you have any specific reforms that you could suggest?

Mr. GRAHAM. Well, I would like to start with encouraging the members of this committee to look very carefully at the operation of OIRA, of the amount of activity OIRA is engaged in to improve these analyses, and there are two concrete ways you can do that: one, you can ask OIRA to provide examples of cost-benefit analyses that were changed because of the reviews that OIRA has done and how they have been improved, because after these rules are done, those public documents should be available, there is nothing deliberative about that; and, second of all, you should be asking for examples of regulations that were withdrawn or returned or whatever because of poor quality cost-benefit analysis. In fact, I can assure you, after working 6 years in the administration and working on these, it is very hard for these couple dozen people at OIRA to keep track of all of these regulations and analyses, and the number of them that are costly is on the rise. It is a very important job that OIRA plays at this time in our American economy.

Mr. LABRADOR. Okay, thank you. Now, the President and his administration keep saying that they have had less regulatory burden than other past administrations. Do you agree with that?

Mr. GRAHAM. I haven't seen the basis for that claim, no.

Mr. LABRADOR. Now, you spoke about midnight regulations in your testimony. Can you explain to us what that is?

Mr. GRAHAM. Well, at the end of Presidential administrations, at the end of the fourth year or the eighth year, there is a historic pattern that presidents and their regulators, they like to get out as many of the rules as they can right at the end of the administration. So you see, in Republican administrations, in Democratic administrations, that last 6-month period tends to be a place where a lot of these rules are issued.

Mr. LABRADOR. Now, has the Obama administration been using that? Because we are not at the end, yet, of his administration.

Mr. GRAHAM. No. And I would be very surprised if this administration is any different than the previous ones. And that is another example of a time when a strong and vigorous OIRA is very important.

Mr. LABRADOR. Okay. Thank you very much.

I yield now to the gentlelady from New York.

Mrs. MALONEY. I thank the gentleman for having this important hearing and for all of your testimony. We are in several different hearings at once. I regret I was not here, but I did read it. In terms of regulation, with the financial crisis, it is really the first financial crisis, according to the Bureau of Labor Statistics, that was caused by the financial industry, basically unregulated aspects of the financial industry. And we saw through this crisis that areas that were regulated did not cause the problem; it was unregulated areas of credit default swaps and innovative new products that had no regulation in the past. In fact, I will never forget President Obama, when he came to Wall Street and unveiled his regulatory proposal, he quoted from the paper and he said many people on Wall Street are upset that these regulations are going to destroy their productivity, and he reads this long statement from the paper and then

he says this is in 1929, 1930, after they created the FDIC, which by all respects performed extremely well to stabilize our markets, protect consumers' deposits, and move forward.

So I would say that the FDIC was a regulation that helped save our economy in many ways, and their ability to wind down companies or to manage them in a way that kept the stability of the financial markets was a plus. For the unregulated areas, Congress had two choices: you could either bail them out, which is a bad choice, or you can close them down, an equally bad choice. The FDIC, with the regulatory tools that they were given and which Dodd-Frank expanded to include the coverage of other areas that were unregulated, you are able to manage it in a way that the shocks to the economy were less, and one of the most riveting testimonies during this time was by Christina Roamer, who was the head of the Economic Committee of Advisors. She said the shocks to the American economy during this great recession were three times tougher and deeper and stronger than they were during the Great Depression.

So in some cases regulations can save industry and can save our financial markets and can protect consumers. So I would just like to ask are there any examples where you have seen regulation maybe improve the quality of life of Americans, the economic security of Americans? And I would like to ask Mr. Arkush if you could testify. I know that you came out with a report recently in this area and I found it a very interesting report, and I would like unanimous consent to put in the record the report that was done by Public Citizen, if that would be appropriate.

Mr. LABRADOR. Without objection.

Mrs. MALONEY. Thank you very much.

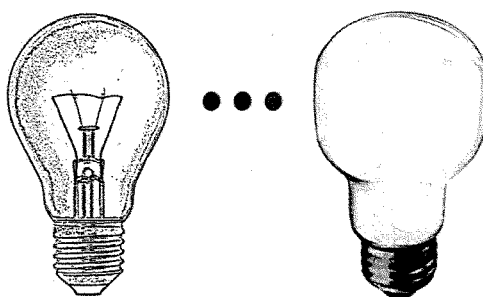
[The information referred to follows:]



# Regulation

## **The Unsung Hero in American Innovation**

September 2011



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**Acknowledgments**

This report was written by Negah Mouzoon and Taylor Lincoln, both of Public Citizen's Congress Watch division. Cover art by Negah Mouzoon.

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**R**egulations have a remarkable history of spurring innovation. This report looks at the regulatory attempts to address five serious problems: wasteful light bulbs, emissions of harmful sulfur dioxide from coal plants, workers' exposure to carcinogenic vinyl chloride, releases of ozone-destroying chlorofluorocarbons from aerosol cans, and inefficient home appliances.

Each case presented a challenge to industry: How to continue offering the same products while complying with the federal regulation? Industry officials fiercely resisted most of these regulations, often claiming that they would be put out of business if a rule under consideration was implemented. Yet, as each proposed rule covered in this report took effect, the industries met the standard—typically by developing better systems or products—and their doomsday scenarios were not realized in the least.

### Regulations That Spurred Innovation

	Regulation	Innovation
<b>Incandescent Light Bulb</b> 	In 2007, the Energy Independence and Security Act increased the standard of efficiency for traditional incandescent light bulbs.  Politicians protested the regulation. but...	Philip's Lighting invented a new halogen incandescent that emits light that is almost indistinguishable from traditional bulbs, uses 30 percent less energy, and lasts three times longer.
<b>Removal of CFCs</b> 	After the scientific discovery that chlorofluorocarbons (CFCs) harm the ozone layer, government agencies implemented a ban on all non-essential CFC aerosol propellants.  Industry protested the regulation. but...	A day after the EPA officially implemented the regulation, the inventor of the original aerosol announced the invention of a cheaper aerosol propellant that didn't pose a threat to the ozone layer.
<b>Vinyl Chloride</b> 	In 1974, OSHA virtually banned emissions of carcinogenic vinyl chloride in the manufacturing of PVC.  Industry protested the regulation. but...	B.F. Goodrich, the largest PVC manufacturer, soon invented a process that both shielded workers from vinyl chloride exposure and was more efficient.
<b>Removal of SO<sub>2</sub></b> 	Beginning with the 1970 Clean Air Act, the federal government began demanding that coal plants reduce emissions of sulfur dioxide, a major air pollutant that causes acid rain and smog.  Industry protested the regulation. but...	In response to the EPA's regulations, industry improved the efficiency of post-combustion sulfur dioxide removal technology, otherwise known as "scrubbing."
<b>Appliance Standards</b> 	During the energy crisis of the 1970s, Congress enacted efficiency standards for consumer appliances being used in residential and commercial buildings.  Industry protested the regulation. but...	The government standards prodded manufacturers to improve the efficiency of their products. These efficiency improvements are projected to save American consumers more than \$240 billion by 2030.

## I. Increasing Light Bulb Efficiency

### The Problem

Traditional incandescent light bulbs are extremely inefficient. They are based on technology invented in 1879 by Thomas Edison. They waste 90 percent of their energy emitting heat, not light, and average just 750 to 2,500 hours of an operating life.<sup>1</sup> Lighting accounts for 30 percent of all electricity used in our country.<sup>2</sup> An average of 82 pounds of coal are burned to produce the amount of electricity that a traditional incandescent bulb consumes in its lifespan.<sup>3</sup>

### The Regulatory Response

In 2007, the Energy Independence and Security Act was signed “to move the United States toward greater energy independence and security.” The law established a series of efficiency standards for light bulbs. The first phase requires a 25 to 30 percent increase in efficiency over traditional light bulbs by 2012. The second stage requires a 60 percent improvement by 2020.

### The Resistance

In 2011, the incandescent light bulb became the *cause celebre* of members of Congress playing to the Tea Party hostility over anything smacking of government regulation. Several bills—including the “Light Bulb Freedom of Choice Act” by Rep. Michele Bachmann (R-Minn.)—were introduced in Congress to eliminate the light bulb efficiency standard. Bachmann also incorporated an attack on the light bulb standards into her campaign for the White House, promising that “President Bachmann will allow you to buy any light bulb you want.”<sup>4</sup>

Critics of the efficiency standard either imply or assert outright that it will ban the use of incandescent bulbs, forcing consumers to use compact fluorescent bulbs, which many dislike because they emit a bluish-white hue. For example, a June 2011 *Wall Street Journal* editorial opened by saying that in seven months, “Washington will effectively ban the sale of conventional 100 watt incandescent light bulbs that Americans have used nearly since the days of Thomas Edison. Instead we will all be required to buy compact fluorescent

<sup>1</sup> See, e.g., “Energy Basics,” U.S. Department of Energy. Available at <http://www.eere.energy.gov/basics/buildings/incandescent.html>.

<sup>2</sup> “The Real Deal on Compact Fluorescent Light Bulbs,” National Audubon Society Facts Sheet, August 2009.

<sup>3</sup> *Ibid.*

<sup>4</sup> Andrew Restuccia, “President Bachmann Will Allow You to Buy Any Light Bulb You Want,” *The Hill*, June 17, 2011.

lights.”<sup>5</sup> Watchdog group Media Matters counted 40 times in which conservative news outlets have claimed that rules slated to take effect in 2012 will require consumers to use compact fluorescents.<sup>6</sup>

### The Results

The law does not ban incandescent light bulbs.<sup>7</sup> It simply requires that light bulbs sold in 2012 be at least 30 percent more efficient than Edison’s 1879 model. Ultimately, the law spurred companies to produce Edison’s light with much less waste.

“There’s a massive misperception that incandescents are going away quickly,” Chris Calwell, a researcher with Ecos Consulting, an energy consulting firm said in 2009. “There have been more incandescent innovations in the last three years than in the last two decades.”<sup>8</sup>

In anticipation of the first phase of requirements under the 2007 energy bill, manufacturers began investing in new bulbs that would both meet the new standards and still produce the soft light of incandescent light bulbs. By 2009, Philips Lighting, a Dutch electronics company, brought to market a new halogen incandescent that emits light that is almost indistinguishable from traditional bulbs, is 30 percent more efficient, and lasts three times longer.<sup>9</sup>

In contrast to old incandescents, Philips’ halogen bulbs use a reflective coating that captures heat and transforms it into light.<sup>10</sup> Other manufacturers, including General Electric and Osram Sylvania, have also introduced energy-efficient halogen incandescents.

The new bulbs cost more than the traditional bulbs. For example, a Philips 100 watt-equivalent incandescent costs about \$4, compared to 25 cents for traditional incandescent light bulbs.<sup>11</sup> But with their increased energy efficiency and longer lifespan, the new bulbs will save consumers money over time, according to the Department of Energy (DOE).<sup>12</sup>

<sup>5</sup> “The Light Bulb Police: Americans Deserve Their Choice of Illumination,” *Wall Street Journal* editorial, June 7, 2011.

<sup>6</sup> “Conservative Media Misled Light Bulb Consumers At Least 40 Times In 7 Months,” Media Matters, July 18, 2011.

<sup>7</sup> See, e.g., Kevin Drum, “Incandescent Bulbs Not Banned. Repeat: Not Banned,” *Mother Jones*, July 15, 2011.

<sup>8</sup> Leora B. Vestel, “Incandescent Bulbs Return to Cutting Edge,” *New York Times*, July 5, 2009

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> See, e.g., “Frequently Asked Questions: Lighting Choices to Save You Money,” U.S. Department of Energy Web site. Available at [www.energysavers.gov/your\\_home/lighting\\_daylighting/index.cfm/mytopic=11978?print](http://www.energysavers.gov/your_home/lighting_daylighting/index.cfm/mytopic=11978?print).

### Additional Innovations: LED Bulbs

Concern over energy efficiency and a government incentives program also have inspired the development of bulbs using light emitting diodes (LEDs)—the type of lights often seen on home electronics—that offer efficiency beyond halogen incandescents or even compact fluorescents.

A Philips LED bulb—which was awarded a \$10 million prize by the DOE as the best replacement for a traditional 60-watt incandescent—emits light indistinguishable from that of traditional incandescents while using only one-sixth the energy.

If every 60-watt incandescent bulb in the U.S. were replaced with the prize winner, the United States would save about \$3.9 billion worth of electricity annually, enough to power Washington, D.C., for three years.<sup>13</sup> LED bulbs still cost \$25 or more, which most consumers would not readily pay even though the bulbs are purported to offer overall savings over their 20-year lives because of their increased energy efficiency. But if history is a guide, the cost of LED bulbs will steadily decline.

## II. Reducing Sulfur Dioxide Emissions

### The Problem

Sulfur Dioxide, SO<sub>2</sub>, is a major air pollutant that causes acid rain and smog, and has long been recognized as a serious health hazard. It contributes to thousands of premature deaths annually in the United States.<sup>14</sup> Most infamously, it caused the 1952 smog inversion in London that killed a staggering 4,000 people in one week.<sup>15</sup>

### The Regulatory Response

About two-thirds of SO<sub>2</sub> emissions come from coal-fired power plants.<sup>16</sup> The Clean Air Act of 1970 instructed the newly formed Environmental Protection Agency (EPA) to set maximum allowable emissions for stationary sources (most importantly, coal plants) and required states to develop federally approved pollution control plans. Nearly all of the resulting state plans called for ongoing reductions in SO<sub>2</sub> emissions.<sup>17</sup> The effect

<sup>13</sup> "Department of Energy to Announce Philips Lighting North America Wins L Prize Competition," U.S. Department of Energy, Aug. 2, 2011.

<sup>14</sup> See, e.g., Resignation letter Eric v. Schaeffer, EPA Director Office of Regulatory Enforcement, Feb. 27, 2002. Available at <http://www.e2.org/ext/document.jsp?docId=1422>.

<sup>15</sup> See, e.g., "The Lethal London Smog Event 5th-9th December 1952." Available at <http://www.world-weather-travellers-guide.com/london-smog.html>.

<sup>16</sup> Margaret R. Taylor, *et al.*, "Control of SO<sub>2</sub> Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," *Technological Forecasting & Social Change*, 2005, p. 354.

<sup>17</sup> *Ibid.*, p. 704.

of these plans was to require utilities operating coal-fired plants to implement “scrubbing” technologies to capture SO<sub>2</sub> emissions before they reached the atmosphere.

Subsequently, amendments made in 1977 to the Clean Air Act required installation of scrubbers in new plants and in existing plants undergoing renovations. Additional Clean Air Act amendments passed in 1990 established a cap-and-trade system that required owners of coal-fired power plants that exceeded set amounts of emissions to purchase credits from companies whose emissions were below the established limits.

#### The Resistance

Industry has fought the implementation of scrubbers all along. It challenged the initial regulations issued under the Clean Air Act of 1970 and lost before the Supreme Court in 1976.<sup>18</sup> Throughout the 1980s, industry opposed the standards that were eventually created by the Clean Air Act of 1990. “Utilities predicted a cost of \$1,000 to \$1,500 for every ton of sulfur dioxide removed. Some said it could not be done even at that exorbitant price,” an op-ed writer recalled years later, noting that the eventual cost ended up being a tenth as much.<sup>19</sup> Meanwhile, coal-fired utilities ignored requirements in the 1977 Clean Air Act to install scrubbers in plants undergoing renovations. The Department of Justice sued nine utilities in 1999 and 2000 for flouting the law.<sup>20</sup>

#### The Results

There are many ways to reduce SO<sub>2</sub> emissions from coal plants, including pre-combustion treatment (in which coal is prepared before its use to improve its burning efficiency) and the use of low-sulfur coal (which naturally emits less SO<sub>2</sub>). But when the Clean Air Act was passed in 1970, flue gas desulfurization (FGD)—commonly known as “scrubbing technology”—was thought to offer the greatest potential for a comprehensive solution.<sup>21</sup>

The emphasis was on “potential.” Although scrubbers were first implemented in London in 1926, they had never worked well. The first scrubbers were not installed in the United States until 1965.<sup>22</sup>

<sup>18</sup> *Ibid.*

<sup>19</sup> Jessica Matthews, “Clean Sweeps: Two Success Stories for the Environment,” *Washington Post*, Dec. 18, 1995.

<sup>20</sup> See, e.g., “EPA’s Smoke Screen: How Congress Was Given False Information While Campaign Contributions and Political Connections Guttled a Key Clean Air Rule,” Public Citizen, October 2003.

<sup>21</sup> Margaret R. Taylor, *et al.*, “Control of SO<sub>2</sub> Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.,” *Technological Forecasting & Social Change*, 2005, p. 704.

<sup>22</sup> Margaret R. Taylor, *et al.*, “Regulation as the Mother of Innovation: The Case of SO<sub>2</sub> Control,” *Environmental Technology*, April 2005, p. 371.



In the 1960s, scrubbers caused serious plugging in boilers and air heaters.<sup>23</sup> In 1970, a National Research Council panel on SO<sub>2</sub> found that commercially proven technologies for control of sulfur oxides from combustion processes did not exist.<sup>24</sup> But the panel predicted that a feasible solution could be developed in one-to-three years.

The stringency of rules instituted in response to the 1970 Clean Air Act "provided an important incentive for the development of FGD technology," researchers Margaret Taylor and others wrote in 2005.<sup>25</sup>

In other words, the law prompted innovation. Although fewer than 100 patents for SO<sub>2</sub> pollution control were issued before 1967 (and none since the mid-1930s), more than 2,500 patents were issued from 1967 through 1997.<sup>26</sup> During the 1970s, the number of scrubber vendors increased from 1 to 16.<sup>27</sup>

In the wake of the Clean Air Act, scrubbers became significantly more effective at capturing SO<sub>2</sub> and less costly to install.

- The percentage of SO<sub>2</sub> that scrubbers were able to prevent from reaching the atmosphere increased from about 75 percent in the mid-1970s to 95 percent by the mid-1990s.<sup>28</sup>
- Capital costs for scrubber technology were cut in half.<sup>29</sup>
- Costs to maintain plants with scrubbers declined, as operators learned to prevent corrosion and other problems that had previously required plants to be shut down for repairs.<sup>30</sup>

<sup>23</sup> *Ibid.*, p. 367.

<sup>24</sup> "Environmental Regulation and Technology Innovation: Controlling Mercury Emissions from Coal-Fired Boilers," Northeast States for Coordinated Air Use Management, September 2000.

<sup>25</sup> Margaret R. Taylor, *et al.*, "Regulation as the Mother of Innovation: The Case of SO<sub>2</sub> Control," *Environmental Technology*, April 2005.

<sup>26</sup> Margaret R. Taylor, *et al.*, "Control of SO<sub>2</sub> Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," *Technological Forecasting & Social Change*, 2005, p. 709.

<sup>27</sup> Margaret R. Taylor, *et al.*, "Regulation as the Mother of Innovation: The Case of SO<sub>2</sub> Control," *Environmental Technology*, April 2005, p. 356.

<sup>28</sup> Margaret Taylor, *et al.*, "The Effect of Government Actions on Technological Innovation for SO<sub>2</sub> Control," Carnegie Institute of Technology, Aug. 1, 2001, p. 2.

<sup>29</sup> *Ibid.*

<sup>30</sup> Margaret R. Taylor, *et al.*, "Control of SO<sub>2</sub> Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," *Technological Forecasting & Social Change*, 2005, p. 713.

Meanwhile, the amount of SO<sub>2</sub> emitted into the atmosphere decreased significantly. Between 1980 and 2008, the amount of SO<sub>2</sub> in the air declined by 71 percent, even though electricity production from coal plants grew by 26 percent.<sup>31</sup>

In 2003, President George W. Bush's Office of Management and Budget determined that the 1990 Clean Air Act program to reduce emissions of SO<sub>2</sub> and NO<sub>x</sub> (another coal plant pollutant) had the largest quantified human health benefits of any federal regulatory program in the previous 10 years—over \$70 billion annually. OMB pegged the ratio of benefits to costs at more than 40-to-1.<sup>32</sup>

SO<sub>2</sub> emissions remain a major health scourge, not because of the inadequacy of scrubber technology but because of industry's intransigence in implementing it. Even today, the EPA regards SO<sub>2</sub> and NO<sub>x</sub> (which also comes largely from coal plants) as so dangerous that it estimated that the reductions in emissions resulting from just from one new set of standards (issued in 2010) will prevent up to 36,000 premature deaths a year.<sup>33</sup>

### III. Protecting Workers from Poisonous Vinyl Chloride

#### The Problem

In January 1974, a public health emergency crisis arose over the discovery that exposure to vinyl chloride, a substance used to produce polyvinyl chloride (PVC), caused a rare but usually fatal form of liver cancer called angiosarcoma.<sup>34</sup>

Industry had been aware for years of troubling evidence of health risks from workers' exposure to vinyl chloride, in large part because of research it funded. But the general public did not learn about the hazards until January 1974, when B.F. Goodrich, the largest PVC manufacturer, informed the National Institute for Occupational Safety and Health (NIOSH) that three employees at one of its plants had died of angiosarcoma.<sup>35</sup>

Investigations over the next few months revealed additional cases of angiosarcoma among vinyl chloride workers, leaving little doubt over the substance's culpability. Other evidence

<sup>31</sup> David M. Hart and Kadri Kallas, "Alignment and Misalignment of Technology Push and Regulatory Pull: Federal RD&D Support for SO<sub>2</sub> and NO<sub>x</sub> Emissions Control Technology for Coal-Fired Power Plants, 1970-2000," MIT-IPC-Energy Innovation Working Paper 10-002, April 2010, p. 2.

<sup>32</sup> "Cap and Trade: Acid Rain Program Results," Environmental Protection Agency Fact Sheet. (Undated.) Available at <http://www.epa.gov/capandtrade/documents/ctresults.pdf>.

<sup>33</sup> "Proposed Transport Rule Would Reduce Interstate Transport of Ozone and Fine Particle Pollution," Environmental Protection Agency fact sheet, undated. Available at <http://epa.gov/airtransport/pdfs/FactsheetTR7-6-10.pdf>.

<sup>34</sup> Paul H. Weaver, "On the Horns of the Vinyl Chloride Dilemma," *Fortune*, October 1974.

<sup>35</sup> *Ibid.*

implicated vinyl chloride in a range of other conditions, including gastrointestinal complications and chromosome damage. But as the health risks became increasingly clear, industry officials expressed doubt over the feasibility of reducing vinyl chloride exposures to assuredly safe levels in a PVC manufacturing environment.

That set up what *Fortune* dubbed “the vinyl chloride dilemma,” which the magazine summarized with this chilling subtitle: “If government allows workers to be exposed to [vinyl chloride], some of them may die. If it eliminates all exposure, a valuable industry may disappear.”<sup>36</sup>

By 1974, PVC had become ubiquitous in American society. Pipes, floor tile, house siding, wire, cables, packaging materials, furniture, bottles, rain coats, shower curtains, medical tubing, auto upholstery, credit cards, Saran Wrap, and phonograph records were among the products being fashioned from white PVC pellets.<sup>37</sup>

#### The Regulatory Response

The Occupational Safety and Health Administration (OSHA) responded quickly to the crisis. Less than three months after the health risk was revealed, the agency issued an emergency temporary standard that lowered permissible ambient levels from 500 parts per million (ppm) to 50 ppm. The next month, the agency issued a proposed rule calling for “no detectable level” of vinyl chloride in workplaces—0 ppm.<sup>38</sup>

#### The Resistance

PVC manufacturers and industries that relied on PVC howled, arguing that the proposed standard could not be met and that they would be put out of business if it were enacted.

“If the proposed ‘no-detectable-level’ standard is adopted, the vinyl chloride and polyvinyl chloride resin producing industries will be forced to close down immediately,” said Ralph Harding Jr., president of the Society of the Plastics Industry, the industry’s trade association.

A report commissioned by the plastics industry warned that the proposed rule would cause “severe economic dislocation,” eliminating 1.7 million to 2.2 million jobs and preventing \$65 billion to \$90 billion in products from reaching the market. Among the casualties of the

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<sup>36</sup> *Ibid.*

<sup>37</sup> Various sources.

<sup>38</sup> *Ibid.*

proposed rule would be the entire automobile industry, which, the report said, "would, in fact, have to shut down."<sup>39</sup>

Firestone, a major PVC manufacturer, said it would be forced out of the plastics business and that it would sue on the basis that the rule was infeasible. To the extent the standard might have been achievable, Firestone said it would have to double its capital costs to meet it.<sup>40</sup>

In written comments submitted to OSHA, MCA Records said if PVC production were halted, "our industry would be forced out of business." The National Association of Home Builders said the proposed rule threatened to put "sorely needed housing . . . beyond the reach of an increasingly large segment of the public."<sup>41</sup>

A company that produced medical tubing warned that curbing supplies of PVC would jeopardize the availability critical equipment used for kidney dialysis and heart surgery.<sup>42</sup>

There were widespread calls for compromise, such as setting the standard at 25 parts per million, which scientists could not affirm to be safe. To the author of *Fortune's* debate-framing article, the answer was clear: OSHA should compromise, not only to protect the viability of the industry but also to ensure society's continued access to the bounty of PVC products.

"It is clear that [OSHA regulators'] task should be to find the right 'trade offs'—to devise regulations in which the benefit of increased health for workers is balanced against the increased cost to the plastic industry and society as a whole," *Fortune* wrote.<sup>43</sup>

In the end, OSHA barely compromised. Fewer than nine months after news had broken of hazards posed by vinyl chloride, OSHA issued a final rule calling for exposures of no more than 1 part per million, except in sealed-off areas in which workers would be required to wear respirators to ensure that they did not inhale any fumes.<sup>44</sup>

OSHA's small concession did not placate industry. The plastics industry trade association said the standard was unrealistic and would likely be impossible for most to meet.

<sup>39</sup> David T. Cook, "Plastics—Jobs vs. Worker Safety," *Christian Science Monitor*, July 15, 1974.

<sup>40</sup> Paul H. Weaver, "On the Horns of the Vinyl Chloride Dilemma," *Fortune*, October 1974.

<sup>41</sup> Walter Mossburg, "Debating Health vs. Jobs: Plastics Industry Mobilizes To Thwart Tough Rules On Handling Vinyl Chloride," *The Wall Street Journal*, June 25, 1974.

<sup>42</sup> *Ibid.*

<sup>43</sup> Paul H. Weaver, "On the Horns of the Vinyl Chloride Dilemma," *Fortune*, October 1974.

<sup>44</sup> "New Rules Set to Reduce Vinyl Chloride Risk," *The Washington Post*, Oct. 2, 1974.

Firestone said the rule “puts the vinyl plastics industry on a collision course with economic disaster”<sup>45</sup> and would “throw 2 million jobs down the drain.”<sup>46</sup>

#### The Results

What happened next was wholly unexpected.

In August 1975, just 10 months after final rule was issued, B.F. Goodrich announced that it had developed a process that would meet the OSHA standards without requiring respirator use. Its system captured residual vinyl chloride in the manufacturing process without allowing it to come into contact with workers.<sup>47</sup> A few months later, Goodrich touted its new technology in a *Wall Street Journal* display ad in which it said the new system “will be simple to operate [and] will increase raw material efficiency.”<sup>48</sup>

In April 1976, Goodrich announced that it had signed licensing agreements for its containment technology with six corporations and that it planned to expand its own vinyl chloride manufacturing capacity at several plants that year.<sup>49</sup> By August, at least three other companies announced they were licensing safety technology or soon intended to.<sup>50</sup>

Shortly thereafter, demand for PVC boomed, prompting the industry to embark on an enormous expansion in manufacturing capacity. “PVC Rolls out of Jeopardy, into Jubilation,” headlined a *Chemical Week* article published just 22 months after the final rule was announced.<sup>51</sup>

In addition to Goodrich’s expansion plans, *Chemical Week* reported, Borden was building a PVC plant; Diamond Plastics planned to build a very large plant and a small plant; Dow Chemical was building a large plant; Stauffer Chemical was adding capacity to an existing plant; Robintech was increasing an existing plant’s capacity by two-thirds; Shintech was expanding a plant by 50 percent; Tenneco was building a mid-size plant; and Continental Oil was adding on to an existing plant.<sup>52</sup>

<sup>45</sup> “Safety Rules Issued for Vinyl Chloride,” *The New York Times*, Oct. 2, 1974.

<sup>46</sup> “New Rules Set to Reduce Vinyl Chloride Risk,” *The Washington Post*, Oct. 2, 1974.

<sup>47</sup> “B.F. Goodrich Says New System Reduces PVC Resin Hazards,” *The Wall Street Journal*, Aug. 27, 1975.

<sup>48</sup> B.F. Goodrich display ad, *The Wall Street Journal*, Dec. 9, 1975.

<sup>49</sup> “Off To a Good Start,” *Chemical Week*, April 28, 1976.

<sup>50</sup> “Getting Out the Last Traces of VCM,” *Chemical Week*, Aug. 11, 1976.

<sup>51</sup> “PVC Rolls Out of Jeopardy, Into Jubilation,” *Chemical Week*, Sept. 15, 1976.

<sup>52</sup> *Ibid.*

Even Firestone, which less than two years earlier had said the OSHA rule would force it out of the plastics industry, announced plans to bring a new PVC plant online by mid-1979, tripling its overall capacity.<sup>53</sup>

"Clearly, those actions signify U.S. vinyl producers' confidence that they have solved the 'OSHA problem' that threatened the viability of their industry less than two years ago," *Chemical Week* wrote.<sup>54</sup>

The planned increases in capacity would supplement an already booming business. PVC shipments in the first half of 1976 were up nearly 52 percent over the previous year, according to the plastic industry's trade association.<sup>55</sup>

Even in the late-1970s, as a recession loomed, the PVC industry continued to roar. "Producers of polyvinyl chloride are so convinced of the plastic resin's potential that they're scurrying with expansion plans, at the onset of a recession," began an August 1979 *Wall Street Journal* article.<sup>56</sup>

The *Journal* article ticked off a series of recently announced expansion plans, including industry-leader B.F. Goodrich's announcement of plans to double its company-wide 7 billion lbs./year PVC capacity over the ensuing six years. As demand for PVC was leveling off in some markets, new uses for the product were being developed, such as making window frames and creating automobile coatings.<sup>57</sup>

A 1995 report on OSHA rules by Congress's Office of Technology Management found that actual costs to implement the vinyl chloride rule were at most \$278 million, compared to OSHA's \$1 billion forecast. But, OTA wrote, the technological advances the rule inspired "enhanced manufacturing productivity, allowed better rationalization of material inputs, largely eliminated the need for manual reactor cleaning (a prime source of high exposures for the workforce), and provided a new source of income to the technology's developers through licensing arrangements."<sup>58</sup>

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Margaret Yao, "Producers of Vinyl Chloride Scurry With Expansion At the Onset of Recession," *Wall Street Journal*, Aug. 15, 1979.

<sup>57</sup> *Ibid.*

<sup>58</sup> Office of Technology Management, *Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytic Approach*, September 1995, p. 67-68.

In 1997, the Centers for Disease control reported that the 1 ppm standard for exposure to vinyl chloride in the workplace was “readily achieved” and that “new cases of hepatic angiosarcoma in vinyl chloride polymerization workers have been virtually eliminated.”<sup>59</sup>

#### IV. Preventing Ozone-Destroying CFC Emissions from Aerosols

##### The Problem

First developed in the 1920s by the U.S Department of Agriculture for use as a refrigerant, chlorofluorocarbons (CFCs) became the preferred substance for use in aerosol cans due to their ability to convert easily between liquid and gas states.<sup>60</sup>

But a groundbreaking 1974 study demonstrated the ability of CFCs to break down ozone. Evidence showed that CFCs were diffusing slowly into the stratosphere and depleting the ozone layer, exposing people to more ultra-violet (UV) radiation, increasing the risk of skin cancer. Excessive UV radiation also contributes to the greenhouse effect and harms the earth's vegetation and animal life.<sup>61</sup> About half of CFC emissions in the United States in the early 1970s came from aerosols.<sup>62</sup>

##### The Regulatory Response

In 1977, the EPA, the Consumer Product Safety Commission (CPSC) and the Food and Drug Administration called for phasing out almost all use of CFCs in aerosol propellants.<sup>63</sup>

##### The Resistance

Industry preferred to use CFC aerosol propellants because they were non-flammable and produced a fine spray.<sup>64</sup> After 1974, with public concern growing over CFCs and industry anticipating a CFC ban, aerosol manufacturers began looking for alternatives.<sup>65</sup> Still, industry denied the scientific premise for the CFC ban. DuPont Corp., the world's largest manufacturer of CFCs, spent an average of nearly \$1 million a year from 1972 to 1982, to challenge the findings that CFCs were depleting the ozone layer.<sup>66</sup>

<sup>59</sup> “Epidemiologic Notes And Reports Angiosarcoma Of The Liver Among Polyvinyl Chloride Workers – Kentucky,” Centers for Disease Control, Feb. 7, 1997.

<sup>60</sup> “F. Sherwood Rowland on Origin and Uses of Chlorofluorocarbons,” See interview with Sherwood. Available at: <http://www.youtube.com/watch?v=1x7HukUOK5>.

<sup>61</sup> “Are Aerosols Environmentally Friendly Now That CFC's Have Been Banned?” NHPR. Available at <http://www.nhpr.org/node/17307>.

<sup>62</sup> EPA Final Rule, See “Chapter 1: Environmental Protection Agency, Subchapter: Toxic Substances Control Act: Parts 712, 762, Fully Halogenated Chlorofluorocarbons,” March 17, 1978.

<sup>63</sup> “Are Aerosols Environmentally Friendly Now That CFC's Have Been Banned?” NHPR. Available at <http://www.nhpr.org/node/17307>.

<sup>64</sup> Bridgette Smith, “Ethics of Du Pont CFC Strategy 1975-1995,” *Journal of Business Ethics*, 1998.

DuPont, with funding from the Chemical Manufacturers Association (CMA), also created the Fluorocarbon Program Panel and, later, the Alliance for Responsible CFC Policy to dispute theories that CFCs harmed the environment. A separate industry group hired Dr. Joyce Brothers, a well-known psychologist, to lead a campaign against anti-CFC news.<sup>65</sup> *Aerosol Age*, an industry trade publication, argued "the chlorine-ozone hypothesis is purely speculative at this time with no concrete evidence having been developed to support it."<sup>66</sup>



Industry also criticized the EPA's proposed timeline for phasing out aerosols. "Finding a substitute for chlorofluorocarbons has not been easy," *Newsweek* wrote in summary of industry's comments. "No single alternative possesses their combination of chemical inertness, non-flammability, fast-drying spray and efficiency in ejecting the entire contents of a can,"<sup>67</sup>.

In 1976, *Chemical Week* asked, "will consumers abandon the aerosol package completely, or will alternative propellant systems be acceptable?"

#### The Results

On May 14, 1977, just one day after the issuance of a federal regulation declaring CFC propellants an environment hazard and ordering them to be phased out, the inventor of the original aerosol valve announced that he had solved the problem. Robert H. Abplanalp said he had developed an aerosol system with a non-CFC propellant that worked better than existing systems.

"Had the controversy not arisen, and this development had come along, it would have wiped out fluorocarbons anyway," said Abplanalp.<sup>68</sup>

While the new system "was perhaps developed in response to government regulation," said Abplanalp, a skeptic of the allegations surrounding CFCs, "this is one of the few times that consumers won't have to foot the bill." Abplanalp's innovation was advantageous because it used a 6:1 product-to-propellant ratio, in contrast to the 1:1 ratio in conventional aerosol

<sup>65</sup> John H. Sheridan, "Hydrocarbons Spur Aerosols' Comeback," *Industry Week*, September 1978, p. 140.

<sup>66</sup> "Ozone Controversy Reaches Congress," *Aerosol Age*, January 1975, p. 6.

<sup>67</sup> Peter Gwynne & Henry McGee, "Psst! Aerosol Alternatives," *Newsweek*, May 9, 1977.

<sup>68</sup> *Ibid.*



applications.<sup>69</sup> It also included a new valve that did not clog as easily and permitted users to fine-tune the spray.

Within two years of the announcement of the rule to ban CFCs in aerosols, CFCs were being used in less than 3 percent of all aerosols.<sup>70</sup> The industry, having suffered from a wave of bad publicity in the middle of the decade, experienced a resurgence.

"Doomsayers were ready to write their obituary, and many consumers think they have been banned. But far from being dead or banned, aerosols are making a comeback," *Chemical Week* wrote.<sup>71</sup>

"Marketers are talking about new-product introductions," said the aerosols development director at Phillips Chemicals. "Aerosols in the homes are no longer hidden under the sink. People do not feel guilty when they buy aerosols."<sup>72</sup>

The crackdown on CFCs, both worldwide and in the United States, continued with increasing urgency, especially with the discovery in the mid-1980s of a substantial hole in ozone layer over Antarctica, for which CFCs were blamed. Eventually, a worldwide ban was imposed against CFC use in air conditioners, refrigerators, and electrical cleaning supplies. By 2005, scientists reported that the ozone layer was recovering.<sup>73</sup>

## V. Improving Home Appliance Efficiency

### The Problem

Residential buildings account for more than 20 percent of the nation's energy consumption.<sup>74</sup> Historically, the refrigerators, air conditioners, furnaces and other appliances that burn all of that energy were not nearly as efficient as possible. Their waste has cost consumers billions of dollars in increased energy bills, while saddling the atmosphere with extra pollution from unnecessary energy generation.

### The Regulatory Response

The Energy Policy and Conservation Act of 1975 established test procedures, targets and labeling requirements for household appliances. The National Energy Act of 1978 instructed the DOE to set efficiency standards for 13 appliances. But President Reagan

<sup>69</sup> "Aerosol Spray Without Fluorocarbons," *Popular Science*, September 1977.

<sup>70</sup> "Aerosols Stage Comeback After Several Lean Years," *Chemical Week*, May 23, 1979.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> See, e.g., Marsha Walton, "Ozone Layer Making a Recovery," CNN, Sept. 2, 2005.

<sup>74</sup> "Multi-Year Program Plan: Building Regulatory Programs," U.S. Department of Energy Efficiency and Renewable Energy Building Technologies Program, October 2010, p. 28.

halted the drafting of regulations shortly after his inauguration in 1981,<sup>75</sup> putting the federal appliance efficiency program on hold for the better part of a decade.

Amid the Reagan administration's hands-off approach to efficiency standards, many states issued their own rules. This eventually convinced industry to lobby for uniform federal standards.<sup>76</sup>

After being rebuffed by a presidential veto in 1986, Congress in 1987 assembled a veto-proof majority to pass a law setting deadlines to enact efficiency standards for most new home appliances.<sup>77</sup> Subsequent energy laws required creation of standards for commercial and industrial products. The energy efficiency program now covers products responsible for 82 percent of residential building energy use, 67 percent of commercial building energy use, and about half of industrial energy use.<sup>78</sup>

#### The Resistance

When the first standards were being drafted in the late 1970s and early 1980s, small businesses predicted that they would suffer dire consequences. "What our competitors have been unable to do—namely, put us out of business—it now appears that our government will do," the president of air conditioner maker Marvair Co. said in 1981. One early 1980s report estimated that requirements to verify that appliances met the standards would put 65 percent of small-businesses manufacturers at risk of bankruptcy.<sup>79</sup>

Meanwhile, larger manufacturers and their trade associations expressed general opposition to the program and warned that instituting efficiency standards might spell the end of familiar products such as self-cleaning ovens, automatically defrosting refrigerators and portable air conditioners.<sup>80</sup> But the manufacturers' opposition began to wane by the mid-1980s.

Much of the strident opposition to federal efficiency standards came from the political sector. For example the Reagan administration said the initial wave of proposed standards "would impose massive regulatory burdens on the private sector."<sup>81</sup> Later, in a statement

<sup>75</sup> "U.S. to Ease Some Energy-Saving Rules," *The New York Times*, Feb. 19, 1981.

<sup>76</sup> See, e.g., Martin Tolchin, "An Industry Asks for Regulation," *The New York Times*, Feb. 17, 1987.

<sup>77</sup> Sandy Johnson, "Reagan Expected to Sign Energy Efficiency Bill He Once Vetoed," Associated Press, March 4, 1987. (Only two House members opposed the bill, future House Majority Leader Tom DeLay (R-Texas) and future House Energy and Commerce Committee Joe Barton (R-Texas).)

<sup>78</sup> "Multi-Year Program Plan: Building Regulatory Programs," U.S. Department of Energy Efficiency and Renewable Energy Building Technologies Program, October 2010, p. 6-7.

<sup>79</sup> Michael Reese and Jerry Buckley, "A Tale of Regulation," *Newsweek*, March 2, 1981.

<sup>80</sup> "Appliance Makers Predict Problems for Energy Saving Standards," *The Washington Post*, May 17, 1980.

<sup>81</sup> "U.S. to Ease Some Energy-Saving Rules," *The New York Times*, Feb. 19, 1981.

accompanying his veto of the 1986 standards-setting bill, Reagan said the “bill intrudes unduly on the free market, limits the freedom of choice available to consumers who would be denied the opportunity to purchase low-cost appliances and constitutes a substantial intrusion into traditional state responsibilities and prerogatives.”<sup>82</sup>

In the mid-1990s, the newly elected Republican Congress targeted efficiency standards as part of an overall assault of federal regulations.<sup>83</sup> President George W. Bush’s administration also slowed the issuance of new standards, prompting a lawsuit from 14 states and other parties. The DOE settled the case in 2006 by entering into a consent decree in which it agreed to publish standards for 22 product categories.<sup>84</sup>

### The Results

Despite the halting progress of the program, federal energy efficiency standards have been a success by almost any measure. Appliances have become dramatically more efficient, their costs have steadily dropped, and industry now stands in alliance with the DOE and consumer environmental groups in touting the accomplishments of the standards—and in pressing for new ones.

Consider refrigerators, which consume about one-sixth of the electricity in a typical house, more than any other item.<sup>85</sup> An averaged-sized refrigerator from the 1980s would cost about \$190 a year to run at today’s electricity prices. Refrigerators purchased today—which employ high efficiency motors and compressors, and improved heat exchangers—cost about \$75 a year to operate. Standards slated to take effect in 2014 will improve refrigerator efficiency by additional 15 percent.<sup>86</sup>

If refrigerator energy use had continued on the trajectory it was on when the first efficiency standards were implemented, the nation would be consuming an extra 160 gigawatts a year just to keep its refrigerators running, according to David Goldstein, who in 2002 received a MacArthur fellowship for spearheading the effort to develop super-efficient

<sup>82</sup> Elizabeth Tucker, “Energy-Standard Veto: No One Won, Groups Say; Business, Consumer Advocates, Utilities Upset,” *Washington Post*, Nov. 5, 1986.

<sup>83</sup> Dan Morgan, “House Conservatives Step Up Assault on Regulations,” *Washington Post*, July 19, 1995.

<sup>84</sup> Memorandum from President Obama to Energy Secretary Chu, “Appliance Efficiency Standards,” Feb. 5, 2009.

<sup>85</sup> See, e.g., California Energy Commission, Consumer Energy Center. Available at [www.consumerenergycenter.org/home/appliances/refrigerators.html](http://www.consumerenergycenter.org/home/appliances/refrigerators.html).

<sup>86</sup> “DOE Standards Will Cut Energy Usage by 25 Percent,” American Council for an Energy-Efficient Economy, Aug. 26, 2011.

refrigerators. The annual savings from efficient refrigerators alone exceeds the entire amount of electricity generated by the United States' nuclear power plants.<sup>87</sup>

But the tremendous advances in refrigerator efficiency have not driven up prices. In January 1987, before standards took effect, an 18 cubic foot Kenmore refrigerator cost just under \$500,<sup>88</sup> or \$994 in 2011 dollars.<sup>89</sup> In August 2011, Sears was selling an 18.2 cubic foot Kenmore refrigerator for \$424, less than half the inflation-adjusted cost of a comparable model from the pre-standards era.<sup>90</sup>

Likewise, clothes washers' energy consumption declined 63 percent from just 2000 to 2006, while dishwashers' water and electricity consumption were both down by about 30 percent over the same time period, according to the Association of Home Appliance Manufacturers.<sup>91</sup> The DOE reports that central air conditioners are 30 percent to 50 percent more efficient than in the mid-1970s, and 20 to 40 percent more efficient than models sold just 10 years ago.<sup>92</sup> Window-unit air conditioners use only half as much energy as those made in the 1970s.<sup>93</sup>

As with refrigerators, most appliances regulated by federal standards cost much less than they did when before the standards were implemented. For example, a 2005 study published by the DOE's Lawrence Berkeley National Laboratories found that the inflation-adjusted prices of freezers, room air conditioners and clothes washers all dropped by well over 40 percent between 1985 and 2002.<sup>94</sup>

More advances are on the way. Appliance manufacturers have agreed to standards to reduce front-loading washers' water and energy use by about 50 percent by 2015; room air

<sup>87</sup> David Goldstein, "Some Dilemma: Efficient Appliances Use Less Energy, Produce the Same Level of Service with Less Pollution and Provide Consumers with Greater Savings. What's Not to Like?" NRDC Switchboard Blog, Dec. 17, 2010.

<sup>88</sup> Sears Ad, *Chicago Tribune*, Section 1, p. 16, Jan. 2, 1987.

<sup>89</sup> Bureau of Labor Statistics CPI Inflation Calculator. Available at [www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).

<sup>90</sup> Sears Web site. Viewed on Aug. 29, 2011.

<sup>91</sup> "Home Appliance Energy Savings Quantified," press release of the Association of Home Appliance Manufacturers (AHAM), June 4, 2008.

<sup>92</sup> U.S. Department of Energy, Energy Efficiency and Renewable Energy, "Central Air Conditioners" Web site. Available at [www.energysavers.gov/your\\_home/space\\_heating\\_cooling/index.cfm/mytopic=12440](http://www.energysavers.gov/your_home/space_heating_cooling/index.cfm/mytopic=12440).

<sup>93</sup> U.S. Department of Energy, Energy Efficiency and Renewable Energy, "Room Air Conditioners" Web site. Available at [www.energysavers.gov/your\\_home/space\\_heating\\_cooling/index.cfm/mytopic=12420](http://www.energysavers.gov/your_home/space_heating_cooling/index.cfm/mytopic=12420).

<sup>94</sup> Stephen Meyers, James McMahon, Michael McNeil, "Realized And Prospective Impacts Of U.S. Energy Efficiency Standards For Residential Appliances: 2004 Update," Lawrence Berkeley National Laboratory, June 24, 2005, p. 24.

conditioners will be at least 10 percent more efficient by 2014; and dishwashers will use nearly 15 percent less electricity and 25 percent less water by 2015.<sup>95</sup>

Standards do not deserve all of the credit for improving efficiency. Product performance generally improves over time, and the energy crisis of the 1970s enhanced demand for more efficient products. Complimentary government programs—such as research and development investments, the mandatory placement of energy consumption labels on appliances, and the incentives in the DOE's voluntary Energy Star program—all have contributed to improving the efficiency of appliances.

But standards have played a key role, both in prodding manufacturers to continue to improve the efficiency of their products and in ensuring that developers install highly efficient products in new buildings. For example, air conditioner maker Carrier Corp. once pointed out that contractors usually choose to install cheaper, less energy-efficient systems, leaving the buyer with the high utility bills.<sup>96</sup> Federal regulation ensures that inefficient products are not available for sale—to consumers or contractors.

The DOE's Lawrence Berkeley National Laboratories, which estimates the share of efficiency improvements resulting specifically from standards (as opposed to other baseline trends), credits efficiency standards with saving American consumers \$64 billion from 1987 to 2005, and forecasts that the standards will save consumers \$241 billion through 2030.<sup>97</sup>

Meanwhile, Marvair Co., the air conditioner maker that once claimed federal energy standards would push it out of business, proudly boasts on the front page of its Web site that the U.S. Patent and Trademark Office has accepted its patent application for an air conditioning system that achieves “substantial energy savings.”

<sup>95</sup> “Major Home Appliance Efficiency Gains to Deliver Huge National Energy and Water Savings and Help to Jump Start the Smart Grid,” joint press release of American Council for an Energy-Efficient Economy and Association of Home Appliance Manufacturers, Aug. 3, 2010.

<sup>96</sup> Michael Reese and Jerry Buckley, “A Tale of Regulation,” *Newsweek*, March 2, 1981.

<sup>97</sup> Stephen Meyers, James McMahon, Barbara Atkinson, “Realized and Projected Impacts of U.S. Energy Efficiency Standards for Residential and Commercial Appliances,” Lawrence Berkeley National Laboratory, March 2008, p. 26.

## VI. Conclusion

This report illustrates a common cycle surrounding regulation. Industry typically first says that proposed solutions to generally recognized problems are too expensive—or even impossible—to meet. After the regulation takes effect, industry invariably develops a solution at far less cost than expected. By then, the once-heated controversy is all but forgotten, the public enjoys better protection, and, often, industry enjoys improved products or processes.

The cycle is instructive in light of the philosophical debate over regulations that permeates American politics today. If today's anti-regulatory ideologues prevailed when the issues in this report were being discussed, industries would not have been pushed to develop the solutions that they eventually achieved.

The promise of innovation should not be viewed as a requirement to justify necessary rules to protect workers, the public and the environment any more than football referees should be expected to help drive up television ratings. What the case studies in this report indicate is that regulations often bring out the best and the worst from the leaders of American industry: A reflexive opposition to public sector demands to solve problems and an unparalleled ability to develop solutions when they put their minds to it.

Mrs. MALONEY. So can you give us some examples where regulation has actually been helpful in making our water cleaner, our air cleaner, our appliances work safer, or that your money that you deposit in a bank might actually be there and not be removed or lost, so that there is economic security for American families? Thank you.

Mr. ARKUSH. Sure. There is obviously a vast number of regulations that protect our air, our water, the safety of our deposits in banks. The report that we issued yesterday was talking about regulations that not only did those types of things, but also spurred innovation in the industries that they applied to. So, for example, when the EPA decided to phaseout CFCs in aerosol because CFCs were harmful to the ozone layer, industry protested, made the usual arguments about how this would kill millions of jobs, it would put an entire sector out of business. But when it finally came down to it, the day after EPA finalized its rule, the very next day, the inventor of the original aerosol announced that he had come up with a solution, and it actually turned out it was not a problem to comply with this great regulation, which prevented the destruction of the ozone layer.

Another example was when OSHA moved to phaseout vinyl chloride, a harmful carcinogen, from the workplace. Manufacturers of PVC pipes said this would destroy their industry and cost lots of jobs. But within 3 months of the finalization of the rule, a company came up with a new manufacturing process for PVC pipe that was more efficient, allowed the companies to comply with the rule, and didn't require them to kill the manufacturing workers.

Mrs. MALONEY. Well, my time has expired, but I think if we are going to discuss the impact of regulations on jobs, shouldn't we also include information about their economic and social benefits, including whether they actually may create new products, new jobs, or protect the American citizens and the American economy, as they have done in terms of the deposit system and other areas?

My time has expired. Thank you, Mr. Chairman.

Mr. LABRADOR. Thank you.

I will now yield to the gentleman from Pennsylvania.

Mr. KELLY. I thank the gentleman. I will yield back my time to the Chair.

Mr. LABRADOR. Thank you. I will take that time.

Mr. Barker, how would the proposed rule banning the importation and interstate trade of snakes affect your business?

Mr. BARKER. Ninety percent of my business is interstate and a smaller percentage is international, and the Lacey Act stops that. The animals can't be crossed across State lines under any circumstances and it is a felony to do so. So whether I sell them or my customer gets them and then he—they just can't be moved across State lines.

Mr. LABRADOR. And does that affect any other businesses as well?

Mr. BARKER. My industry is tightly interconnected with many, many other large and small businesses. My wife and I spend a lot of money at Home Depot; we spend a lot of money with Delta Air Cargo; we spend a lot of money with FedEx. We buy snake cages and they, in turn, buy stainless steel plastics, glass, whatever. We

buy rats; the rat breeders invest in cages, the rat breeders buy food, the grain mills buy grain from—it is not—people who don't like snakes or don't know about snakes don't realize how widespread it is and how interconnected it is and how many people do it.

Mr. LABRADOR. Thank you. I am not a big fan of the snake.

Dr. Graham, you just heard the gentlelady from New York talking about how we needed to also discuss the benefits of regulation, and I am always confused when I hear that because I think that is implicit in the term cost-benefit analysis. I mean, isn't that what we are asking? We are not asking to only look at the cost of regulation; we are asking to look at both, isn't that correct?

Mr. GRAHAM. Yes. And when I teach my students, I use the phrase benefit-cost analysis because I tell them that B has the alphabetical advantage, and it is to remind people that benefits are important, as well as costs.

Mr. LABRADOR. So you are not here to say that there are no benefits to regulation.

Mr. GRAHAM. No. There are often quite substantial benefits.

Mr. LABRADOR. Okay.

Mr. Arkush, I am going to ask you a few questions. I looked at your impressive resume and you have some great experience in academia; you went to some great law schools. How much experience have you had in the private sector?

Mr. ARKUSH. Well, I have worked, I have had many jobs, and, as I mentioned earlier, I am actually in a—

Mr. LABRADOR. In a band. Absolutely.

Mr. ARKUSH. It is a lot of work.

Mr. LABRADOR. It is a lot of work. How many employees have you had in your life?

Mr. ARKUSH. I have never had a full-time employee myself.

Mr. LABRADOR. So how can you sit here with all these job makers and say that there is no cost to the regulatory burden that their jobs have?

Mr. ARKUSH. I certainly never said there is no cost.

Mr. LABRADOR. Okay, you said that there is not a single regulation that you can think of that is bad. Is that correct?

Mr. ARKUSH. Well, that is right, not off the top of my head. In fact, today I think we have only heard—all we have heard is repetition about two or three specific examples.

Mr. LABRADOR. But we have had hundreds of hearings about regulations, and I think there are numerous regulations that are bad. But actually your testimony today actually contradicts what you are saying. You tell us that it was the failure to regulate that created a lot of the problems, but then you said something that I actually agreed with, but I don't think you realized what you were saying. You said that there is not too much or too little regulation; sometimes the problem is that we don't have the right regulation. Isn't that true?

Mr. ARKUSH. Absolutely.

Mr. LABRADOR. Well, if there is not too much or too little, it means that some of our regulations are actually not correct, not the ones taking care of the problem. So the problem is not that we



don't have regulation; the problem is that we don't have the right regulation in some instances, correct?

Mr. ARKUSH. That is sometimes right.

Mr. LABRADOR. So wouldn't, by implication, that mean that some of the regulations that we have right now are bad?

Mr. ARKUSH. I don't doubt that there are some; I just, off the top of my head, I don't have examples for you. And no one else has provided examples today either, I might point out, except for GIPSA and an NLRB rule and the Lacey Act.

Mr. LABRADOR. Yes, because these are the things that we are testifying about today.

Mr. ARKUSH. Well, your hearing is about the overall broken process and why it leads to flawed regulations. Only three have been mentioned.

Mr. LABRADOR. And we have a whole report that has been entered into the record. It is 30 pages of regulations that actually affect. I just think, you know, when we talk about regulations, we have a problem because people like yourself come in here and say that there is no problem with the regulatory burden. But at the same time they are not willing to look at regulations that are maybe outdated, that maybe we should just get rid of because they are actually hurting the economy, they are hurting us; and you are not willing to look at any of those things.

Mr. ARKUSH. I am absolutely willing to concede that obviously there could be, and there probably are, somewhere out there regulations that are unnecessary or burdensome, but we should talk about them specifically and I think we ought to fix them where they are. But the overwhelming weight of the evidence is that regulations are wildly beneficial; they have returned a 700 percent rate of return for us.

Mr. LABRADOR. You know, and the most ironic thing about your testimony was, in the end, your last line in your testimony, Congress should get to work on reducing the unnecessary burdens placed on the agencies that protect our health and environment. And it is just really beyond the pale for me to think that you think it is more important for Congress to reduce the burden on regulators than it is to reduce the burden on job creators. But my time has expired and I will now—now it is my time and I will yield my time—

Mr. ISSA. Would the gentleman yield?

Mr. LABRADOR. Absolutely.

Mr. ISSA. I thank the chairman. I am back.

I am going to ask just a final round, and I appreciate your patience and your dialog here. But I am going to ask something that I think crosses all of you. Some of you are very young; some of you are a little more like me, a little less young; and some of you are in between. But I grew up in Cleveland, Ohio in the 1950's and 1960's, so I grew up at a time in which we were an industrial capital; auto, steel, and rubber, plenty of coal still burning. My grandmother actually burned coal in a plain, old-fashioned big thing down in the basement that just hot air rose through the house. Our buildings were black, and it wasn't until they really cleaned up the city years and years later that it was worth cleaning them off and showing the stone underneath. So I am somebody who has appre-

ciated clean air, clean water, improvements. But I also have seen that Cleveland no longer produces cars; less engines, no rubber, no tires, steel mills are pretty well gone and so on. So I see the balance.

I want to ask you a fairly simple question, and, Mr. Arkush, I will start with you. If in fact regulations individually all do good things, but the price of getting cleaner air and cleaner water and less pesticides, and everything else that we would like to have as goals, and certainly not losing species and so on, if the price is that our unemployment rate goes from 9 percent to 10 percent to 11 percent to 14 percent because simply the jobs created by being competitive around the world are diminished and transferred to outside the country, are we better off? Or isn't there a balance that this committee and the regulatory regimen have to make sure are balanced of full employment, competitiveness, and clean air, clean water, safety and the like?

Mr. ARKUSH. Mr. Chairman, that is the most difficult challenge facing you and facing the regulators, obviously, when there is a difficult decision to be made between economic costs or jobs and protecting the public. Fortunately, what the evidence shows is the cost just doesn't come up. That question isn't often posed by the regulations that our agencies produce; they overwhelmingly have benefits that outweigh the costs, even though the costs are much easier to quantify than the benefits.

Mr. ISSA. And I appreciate that. I want to follow up with you quickly. When you say costs and benefits, the current benefits—and Dr. Graham, I am sure, can help us with this—the benefits are not necessarily global competitiveness. In other words, you can cumulatively have benefits and cumulatively become less competitive and, thus, lose jobs, can't you?

Mr. ARKUSH. And I think the attempt is to incorporate everything into the equation.

Mr. ISSA. Dr. Graham, you are not still at OMB, but were you able to do that during the Bush administration? There were increases in regulations, not quite at the rate that they are going now, but there were a lot of increases, and we began, continued losing our competitive edge against the rest of the world. Isn't that true?

Mr. GRAHAM. Well, let me start by saying I am a born and raised Pittsburgher family in the steel industry—

Mr. ISSA. So you have no sympathy, being that you were from the poor cousin of the Cleveland Browns.

Mr. GRAHAM. Yes. Right. [Laughter.]

And I think that the demise of industry in cities like Pittsburgh and Cleveland has a complicated history and terrain, and it has elements of not adequate technology; it has elements of labor costs; it has elements of regulation. All of this is in the story.

But one thing to remember is that when we do these cost-benefit analysis, we do the analyses one at a time on individual regulations. What happens, however, is when you have a suite of regulations that simultaneously hit the same sector, it is hard, when we do cost-benefit analysis, to handle kind of the combination of that. And there are certain sectors in our economy, and steel is certainly

among them, autos is among them, mining is among them, they are really under a lot of—

Mr. ISSA. Logging.

Mr. GRAHAM. Logging would be another example. And we should be candid about the fact that when we do individual cost-benefit analyses of individual rules, we don't necessarily capture that combination.

One final point. These huge benefits that you are hearing about from Mr. Arkush's testimony, what he is doing, he is taking some really wonderful regulations, clean air examples or automotive safety examples, he is combining them with a bunch of other regulations which aren't so great, and he is saying the overall benefits are greater than the overall costs. Well, that is true, but we shouldn't defend all of the weak or bad regulations on the grounds that there are some really great ones out there. And that is why it is important to look at this as analytically as we can.

Mr. ISSA. I want to just close by noting something, Dr. Graham, that you had in your opening statement. I am deeply concerned that the CAFE standard change was done the way it was because of process. I am also deeply concerned that if we fudge the numbers so that an electric car gets considered to have, if you will, no pollution, when in fact it is fed maybe by coal-fired electric plant, that what we are doing is forcing ourselves into one solution that may not be as good as an enhanced diesel, hybrid, or even a conventional car or, for that matter, compressed natural gas, lots of other solutions.

So, in closing, I appreciate the indulgence, Mr. Chairman, and I look forward to the next panel, and thank you.

Mr. LABRADOR. Thank you very much.

Now we would like to excuse the panel. We thank you for being here and we are just going to recess for a few minutes. Thanks.

[Recess.]

Chairman ISSA. The committee will come back to order.

We now recognize our second panel, the Honorable Cass Sunstein is the current Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, and we are very delighted to have you here today. Pursuant to the committee rules, we would appreciate it if you would rise to take the oath. Raise your right hand.

[Witness sworn.]

Chairman ISSA. Let the record reflect the witness has answered in the affirmative.

Administrator, you were here for the first panel, and I appreciate your being here for that entire time. I also appreciate your additional comments that have been made and your cooperation throughout this process. You are a single witness. We are not going to hold you to exactly 5 minutes, but come as close as you can. And, with that, the gentleman is recognized.

**STATEMENT OF CASS SUNSTEIN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET**

Mr. SUNSTEIN. Thank you very much, Mr. Chairman and members of the committee. It is an honor and a pleasure to have the

chance to appear before you to discuss issues relating to regulation and regulatory review, and I am especially grateful to you, Mr. Chairman, and to the committee as a whole for its constructive and important work on this issue over the past months; it is very significant to try to get regulation in a place where it is helpful to the economic recovery.

In the last 8 months, much of our work at the Office of Information and Regulatory Affairs has focused on the recent Executive order on regulation, and especially on the requirement of retrospective analysis of existing rules. My written statement deals with the 500 reform proposals that have now been released to the public and the associated economic savings, which are in the billions of dollars. It is my belief that these reform initiatives and this general enterprise, which is ongoing, is consistent with the thrust of this particular hearing and the policy goals that are shared on a bipartisan basis.

In these oral remarks, what I am going to do is focus on three topics: first, the basic process of review under our Executive orders; second, the role of the Regulatory Flexibility Act focused on small businesses; and, third, an issue that has been discussed a great deal in the last 6 months, that is, the relationship between OIRA and the independent regulatory agencies.

Since 1993, under President Clinton, Executive Order 12866 has established governing principles, requirements, and processes. It builds, incidentally, on an Executive order from President Reagan in 1981, which set out the fundamental charter, which continues to this day.

As stated in the 1993 Executive order, and to the extent permitted by law, agencies must propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, a clear endorsement of cost-benefit analysis; second, tailor its regulations to impose the least burden on society; third, select among alternatives the approach that maximizes net benefits; and, fifth, identify and assess available alternatives to direct regulation. More freedom should be allowed if it is consistent with law.

The same Executive order establishes the process of centralized review in which proposed and final significant rules are submitted to OIRA for an interagency process in which different components of the Federal Government comment on the rule that the agency proposes. OIRA is also available—I would like to underline this point—during the process to meet with anyone who wants to discuss regulations under review, including people who were on the previous panel. The meetings may involve business organizations, State and local governments, or congressional staff; and we have had some important ones in all of those domains over the last few years. In the vast majority of cases, the proposed or final rule is changed as a result of these processes.

If the draft final rule follows public notice and comment, as is the case typically, then much of the attention of review is on public comments and concerns. In the recent past, those comments or concerns have led to fundamental rethinking of regulatory proposals. There has been some discussion of the number of rules and we very much appreciate the concern of excessive numbers.

I would like to note, just as a supplemental point, that the number of rules issued in our first 2 years that have gone through our office is actually lower than the number in the previous 2 years under President Bush and, indeed, is lower than the average, at least in the second term, of the Bush administration.

Okay, the interest of small business in particular are protected by the Regulatory Flexibility Act. The Office of Advocacy of the Small Business Administration plays a crucial role in ensuring adherence to that statute, and OIRA works very closely with that office to protect small business against unjustified rules. Of special note is that office's statement from just this year, just a few months ago. As a result of improvements to the RFA, Advocacy's work on small businesses' behalf has required greater involvement in Federal rulemaking. The Office has had more success in urging burden-reducing initiatives, and there is a list where the Office of Advocacy has had that greater success. In short, the trend is going in the right direction.

As you are aware, independent regulatory agencies under both Democratic and Republican presidents have not been covered by the regulatory review process, out of respect for the legal independence of those agencies. Nonetheless, President Obama, with the enthusiastic endorsement, I know, of many on both sides of the aisle, took a significant and novel step with a different executive order which states that independent agencies should follow the cost-producing requirements of Executive order and should engage in the process of retrospective review.

Our hope is that, as a consequence, a direct consequence, the Nation will see significant improvements and significant savings, significant reductions in regulatory burdens. We are encouraged by the early results from the independent agencies.

With that said, I am looking forward to answering your questions.

[The prepared statement of Mr. Sunstein follows:]

**TESTIMONY OF CASS R. SUNSTEIN**  
**ADMINISTRATOR,**  
**OFFICE OF INFORMATION AND REGULATORY AFFAIRS**  
**September 14, 2011**  
**House Oversight and Government Reform Committee**

Mr. Chairman and Members of the Committee:

I am grateful and honored to have the opportunity to appear before you today to discuss issues relating to regulation and Executive Order 13563, Improving Regulation and Regulatory Review. In the recent past, and in the implementation of that Executive Order, we have made significant progress in eliminating unjustified regulatory costs. I will begin by focusing in particular on retrospective review of existing rules, or less formally, the “regulatory lookback.”

In section 6 of Executive Order 13563, the President ordered executive agencies to undertake an ambitious review of existing federal regulations. Emphasizing that we must “measure, and seek to improve, the actual results of regulatory requirements,” he directed such agencies to produce, within 120 days, preliminary plans to reassess those requirements and to improve, streamline, or eliminate them where appropriate.

Last May, agencies released over two dozen preliminary plans, identifying reforms that will save billions of dollars in the coming years. At the same time, agencies asked members of the public to evaluate their preliminary plans, to identify new reforms, and to participate in the creation of an improved regulatory system, reducing costs and promoting economic growth and job creation.

Last month, twenty-six agencies released their final regulatory review plans. The plans span 805 pages. They include over 500 initiatives that will reduce costs, simplify the regulatory system, and eliminate redundancy and inconsistency.

As the plans demonstrate, a great deal has already been achieved. Significant burden-reducing initiatives have been finalized or publicly proposed from the Department of Labor, the Environmental Protection Agency, the Department of Transportation, and the Department of Health and Human Services. These initiatives are expected to save more than \$6 billion over the next five years.

Consider just three examples of already-completed reforms:

- A final rule of the Department of Health and Human Services reduces costs and improves access to care in rural areas by permitting hospitals to use telemedicine to obtain services from a practitioner credentialed at a distant hospital (so long as that hospital is also a Medicare-participating entity and there is a written telemedicine agreement in place between the hospitals). This rule is estimated to save approximately \$65 million over the next five years; it will also facilitate access to a broader range of care and services for patients.

- The Department of Labor has finalized a rule eliminating 1.9 million burden hours formerly imposed on employers; in monetary terms, that rule is expected to save over \$200 million in the next five years.
- The Environmental Protection Agency finalized a rule excluding all milk and milk product containers from its oil spill regulations. EPA estimates that the savings will be more than \$700 million over the next five years.

Estimates of the monetized five-year savings from just a small fraction of the plans' initiatives range up to \$10 billion or more. This figure includes initiatives that are completed, formally proposed to the public, or well beyond the planning stages. We hope and expect that ultimately, the savings from the numerous initiatives will greatly exceed that \$10 billion figure.

The relevant reforms span a wide range. A number of them involve reducing paperwork and reporting burdens, which members of the public, and small businesses in particular, have asked us to address. Many others involve eliminating redundant or excess regulatory requirements. Consider just a few examples:

- The Department of Health and Human Services will soon propose to remove unnecessary regulatory and reporting requirements now imposed on hospitals and other healthcare providers, potentially saving an anticipated \$4 billion over the next five years.
- The Department of Labor is finalizing a rule to simplify and to improve hazard warnings for workers, likely saving employers over \$2.5 billion over the next five years while, at the same time, improving worker safety.
- The Department of Transportation is proposing a rule, announced last month, that will eliminate unnecessary regulation of the railroad industry, saving up to \$340 million in the near future, and avoiding the risk that regulatory costs will be passed onto consumers.

Many of the new reforms focus specifically on small business. For example, the Department of Defense recently issued a new rule to accelerate payments on contracts to as many as 60,000 small businesses, thus improving their cash flow in an economically difficult time. To help small business borrowers, the Small Business Administration is adopting a single electronic application to reduce the paperwork burden now imposed on certain lenders, which will in turn benefit borrowers who seek relatively small amounts of capital to grow and succeed.

All of the plans explicitly recognize that the regulatory lookback is not a one-time endeavor. Agencies will continue to revisit existing rules, asking whether they should be updated, streamlined, or repealed. And they will do so in close consultation with the public. Ideas are welcome at any time.

Let me conclude with two additional points. Many people have suggested that independent regulatory agencies should participate in the lookback process. In Executive Order 13579, the

President said that they should do exactly that, and asked them to produce their own plans within 120 days. We are hopeful that significant savings will result from these efforts as well.

Many people have also expressed concern with the “flow” of new rules, not merely with the “stock” of existing rules. With respect to new rules, Executive Order 13563 provides a series of directives and requirements. The Executive Order makes explicit reference to “economic growth, innovation, competitiveness, and job creation,” and it states that our regulatory system “must promote predictability and reduce uncertainty.” Among other things, and to the extent permitted by law, the Executive Order:

- Requires agencies to consider costs and benefits, to ensure that the benefits justify the costs, and to select the least burdensome alternatives.
- Requires increased public participation. The order directs agencies to promote an open exchange with State, local, and tribal officials; experts in relevant disciplines; affected stakeholders; and the public in general. Attempting to bring rulemaking into the twenty-first century, the order requires use of the Internet to promote such an exchange. It also directs agencies to act, even in advance of rulemaking, to seek the views of those who are likely to be affected.
- Directs agencies to take steps to harmonize, simplify, and coordinate rules. The order emphasizes that some sectors and industries face redundant, inconsistent, or overlapping requirements. In order to reduce costs and to promote simplicity, it calls for greater coordination within and across agencies.
- Directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public.

As President Obama has said, “We can make our economy stronger and more competitive, while meeting our fundamental responsibilities to one another.” We will continue to eliminate unjustified regulatory costs, and thus strengthen our economy, while taking sensible, cost-effective, evidence-based steps to protect public health and welfare.



Chairman ISSA. Thank you. And because Mr. Gowdy has crucial other committee work, I would yield first to Mr. Gowdy for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

Thank you, Professor, for your testimony. This is actually not a trick question. I will read you the same quote I read to the first panel. "We should have no more regulation than the health, safety, and security than the American people require." That was a quote from the President. Do you agree with that?

Mr. SUNSTEIN. I agree with my boss.

Mr. GOWDY. That is why I said it wasn't a trick question. I am not trying to get anybody in trouble. At 9.2 percent unemployment, I don't want to add to it.

Is there anything that should have been added to that series?

Mr. SUNSTEIN. Health, safety, security? I think it is pretty comprehensive.

Mr. GOWDY. Do you know or are you familiar with someone by the name of Dudley Butler?

Mr. SUNSTEIN. I do not know that name offhand.

Mr. GOWDY. If he were an administrator, either past or present, U.S. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration—there would be no reason for you to know him, I don't imagine, and you don't have to know him to be able to answer my question. He referred to a proposed rule as a plaintiff lawyer's dream. Would you agree that that is not an appropriate factor to be considered in the promulgation of a rule or regulation?

Mr. SUNSTEIN. I wouldn't want to say anything negative about a colleague whom I don't know and for which I don't know the context exactly. I would say, in general, the question is whether regulation conforms to the law and existing executive orders, and the question is not whether it is someone's dream.

Mr. GOWDY. Violations of rules and regulations, are they ever considered evidence of negligence in civil litigation?

Mr. SUNSTEIN. That is possible. It depends on the context.

Mr. GOWDY. Violations of rules and regulations, are they ever considered negligence per se in civil litigation?

Mr. SUNSTEIN. You know, I would want to bone up on my tort law, but it wouldn't be stunning if the answer were yes.

Mr. GOWDY. So an ancillary reason to be concerned about what some perceive to be the excessive promulgation of rules and regulations would be that it contributes to what some believe is an already litigious society.

Mr. SUNSTEIN. This is a very important question, the relationship between Federal regulation and tort law, and you are on to something, if I may say, that would be very valuable for all of us to have clarity on. Sometimes what happens is a regulation displaces State tort law, it eliminates it; sometimes it, as your question suggests, it kind of puts State tort law on steroids because it gives a tool to the plaintiff that didn't exist before. And whether the preemption or the, let's say, enhancement of State tort law is desirable very much depends on the context. I do take your point that there are contexts in which the amplification of the civil liabil-

ity system, the regulation, let's call it the non-preemption regulation creates can be harmful. There are such situations.

Mr. GOWDY. Are you familiar with and do you support in theory the Raines Act, which is pending in the House?

Mr. SUNSTEIN. I am familiar with it. The administration agrees with the cost reduction goals of the advocates of the Raines Act. The administration does not favor the Raines Act on the ground that the tool it gives to Congress Congress already has to eliminate rules, and that there is a risk that the Raines Act would have unintended consequences. Just to give you one example, when I last looked at the text, it would sweep up deregulatory initiatives in its ambit, so our efforts to eliminate costly rules would be delayed, and possibly indefinitely, by this new and very dramatic departure from longstanding practice.

Mr. GOWDY. Do you agree in general that Congress has abdicated its responsibility for filling in the details of legislation to executive branch entities?

Mr. SUNSTEIN. Well, I wouldn't want to make a general statement on that because there are many laws, as you know, which are quite detailed and prescriptive, where the Executive has exceedingly little discretion; there are others where it has large discretion. And in those cases in which it has large discretion, whether it is an abdication or a recognition of changing circumstances or the need for technical expertise depends on the area. I do understand that many people on both sides of the aisle have been concerned about excessive delegation under some statutes.

Mr. GOWDY. My time has expired.

Thank you, Mr. Chairman.

Chairman ISSA. I thank the gentleman.

We now recognize the ranking member and would ask unanimous consent that he have one additional minute. I shorted or exceeded myself at the end. Without objection, the gentleman is recognized.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

There is a lot of rhetoric in the committee and on the House floor describing regulations as job killers, but regulations perform a critical role in implementing some of our most important laws, such as the Clean Air Act. EPA estimates that in 2010 alone the Clean Air Act prevented over 160,000, 160,000 premature deaths. Those are real people who are alive today because of these protections.

Majority Leader Cantor sent a memo to House Republicans on August the 29th laying out the Republican leadership's agenda for the fall. The memo identifies a list of agency rules the Republican leadership wants to eliminate. These include rules aimed at protecting public health, the environment, and workers' rights. Mr. Cantor's memo makes assertions about the costs of these rules but does not discuss the benefits.

Mr. Sunstein, shouldn't any evaluation of an agency rule include analysis of the benefits the rule provides?

Mr. SUNSTEIN. Absolutely yes.

Mr. CUMMINGS. Of course, I believe we can always improve regulations to make them better. In fact, the President issued an Executive order in January that required agencies to review existing regulations and streamline them when appropriate. In response,

agencies developed draft plans in May and the public was given the opportunity to comment on those plans.

As you highlighted in your testimony, those plans include over 500 initiatives that are expected to save more than \$6 billion over the next 5 years. I understand that the agencies were tasked with developing these plans while considering both the costs and benefits of these rules. How were they able to find such significant savings while still ensuring the health, safety, and protections provided by these rules? Were they just outdated? Did circumstances change? Did any of them have anything to do with new technology, then making them obsolete? Tell us about that, because I think that can provide us guidance with regard to what we are trying to do, and that is strike a balance between making sure that we have rules that we really need to protect the health, welfare, and the safety of Americans, but at the same time get rid of those that just don't make sense anymore.

Mr. SUNSTEIN. It is a great question, and at some point——

Mr. CUMMINGS. Thank you.

Mr. SUNSTEIN [continuing]. At some point probably a book will be written about it, how agencies were able to identify so many reforms. And the \$6 billion figure identified I think we are going to be able to do a lot better than that; that is just a small fraction of the 500 reforms. Let me give you an example by way of getting into your question.

The EPA has actually proposed to eliminate tens of millions of dollars in annual expense put on small business owners because of air pollution requirements for gas stations, which are not helpful because modern cars already control the air pollution; you don't need the gas stations to do it. So it is completely redundant. That is a case where the rule, when issued, at least for all I know, served a function. But it doesn't serve a function anymore.

And there are other regulations like that where, at the origin, it made some sense, but the technology, as you say, has evolved. Some of the savings involved just learning from experience. For example, we have OSHA eliminating 1.9 million hours in paperwork and reporting requirements imposed on employers. OSHA has learned that those aren't helping worker safety. They are providing some information, but it is not information that the government needs in order to do its job. So that is when you learn. And I am excited about this for our future, unbreaking those aspects of the regulatory system that aren't working so well, just learning how things are operating on the ground.

There are other things, and this is maybe relevant to your job, where a law, as enacted, may overshoot a bit because the text may sweep up conduct that doesn't really cause the harms that the law is designed to prevent. So we have an oil spill rule which is serving important functions, but the definition of oil turned out to include milk. Well, there is a difference between milk and oil in terms of environmental harm, and a lot of work had to be done to exempt milk and dairy industry from onerous regulatory requirements. Because Congress got alert to the problem, it gave EPA the authority to fix it. It took a while to fix it, and with the President's action it got fixed in a hurry.

There are other categories of things where there are compliance dates, for example, or requirements that are issued in 1 year which, when the relevant year comes around, it just doesn't make much sense anymore given the economic situation. So you may have noticed, it got a lot of publicity, that States and localities all over the country were asked—and this was by the Bush administration acting in good faith—to change their street signs and traffic controls. By the time the compliance date came along, this new font size requires and States and localities are saying you are asking us to spend millions of dollars when there is not an ascertainable safety benefit, and the Secretary of Transportation, Secretary LaHood, was very concerned and thought, given our current situation, this is not what States and localities have to do. So we propose to take away that multimillion burden.

Mr. CUMMINGS. Well, the method that is being used to get to those kinds of situations that you just stated, I guess it is like a screening process, like you have tea and you have to pour through the tea to get what you want, but you want to keep something there, a strainer. Do we have a sufficient strainer? Do you understand what I am saying? In other words, are we catching? Do you feel like we have put together the mechanisms to catch?

Mr. SUNSTEIN. I don't have an abstract answer to that question, but I do think that it is often the case that laws, like regulations, have unintended adverse consequences, including unintended coverage. And what we found with our look-back process, and not infrequently with our notice and comment process, is that if we just listen to people who are running businesses or otherwise affected by our rules, they can tell us things that can help create a good strainer.

Mr. CUMMINGS. Thank you.

Thank you, Mr. Chairman.

Chairman ISSA. I thank you.

The gentleman from Michigan, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman.

I thank you for being here, Mr. Sunstein. Two issues I want to address with you, the first being GIPSA. And I take that in reference to a point that Representative Gowdy was attempting to get out, and you appropriately chose not to answer based upon a colleague's statements that you clearly weren't aware of. But I do want, for the record, to make sure that we understand, in relation to this GIPSA question and the fact of being a former member of the House Ag. Committee that passed the 2008 Farm Bill and did a lot of work on making sure that that issue, GIPSA, was covered well and regulations were put in place realistically, and a concern now that USDA and GIPSA have gone well beyond the intent of Congress in that proposal and those regulations.

Mr. Dudley Butler, J. Dudley Butler, in commenting about the rule and its ability to allow for more litigation in the future, he said this, "When you have a term like unfair, unreasonable, or undue prejudice, that is a plaintiff lawyer's dream. We can get in front"—and that is my concern, we—"we can get in front of a jury with that. We won't get thrown out on what we call summary judgment because that is a jury question." I think you would justifiably

understand our concern when a regulator makes that type of statement in relationship to GIPSA.

Let me go on and ask a question here. As you may know, multiple studies have been released questioning the economic impact of the proposed rule and what it would be doing and the cost that there would be there, which would result to more than \$100 million. Will you consider having the rule withdrawn and having the USDA initiate a more thorough economic impact study before going forward?

Mr. SUNSTEIN. Well, thank you for that. If the rule has \$100 million in annual impact, then it is required to have an economic analysis associated with it. So that is just simple and straightforward. And if, originally, a rule comes in, in answer to the chairman's question, originally it was proposed, didn't look like it would have \$100 million, and then it turns out it is going to, then at the final stage it has to have that analysis.

Mr. WALBERG. So even though, initially, it looked like the study that was done was done in a cursory fashion to make sure it didn't cross the \$100 million level, if it ultimately shows that it is going to be more, you are telling me that there will indeed—

Mr. SUNSTEIN. There will be a regulatory impact analysis; will in italics.

Mr. WALBERG. We will certainly look for that.

Let me move forward here on the silica issue. And I chair a subcommittee that deals with MSHA, and a lot of minds are concerned, farmers and others, because sand is certainly, as you know, everywhere. Currently, OIRA is reviewing OSHA's proposed changes to the silica standard. This proposal has been under review for almost 6 months, and I appreciate the fact that it is still under review and has not come out, because if it were to come out there are some significant concerns on my part. In August 18, 2011, I copied OMB on a letter asking OSHA to publish an advanced notice of proposal rulemaking in order to allow for stakeholders to understand what changes are being contemplated. I await that response. In that letter, I noted that the cost estimated of lowering the standard would be between \$3 to \$5 billion by a small business panel in 2003 that looked into it. Additionally, the lowering of the standard, which has been effective so far in that silicosis is going down, it is not going up, the lowering of the standard by half, which is what many in the affected industries are expecting, would effectively lower the limit to be virtually impossible to enforce.

Can you explain how OIRA is reviewing the proposed regulation and its impact on job creation?

Mr. SUNSTEIN. Yes. I am pleased to do that. I should avoid discussing the details of the particular rule under review, but I can tell you some general principles that bear on all rules.

The first is conformity to law. That is our number one priority; that is the foundation. And there are requirements in the Occupational Safety and Health Act, including feasibility requirements, that would be relevant to any OSHA rule, and many other agencies' rules which have a feasibility or achievability constraint built into the law.

Apart from the law, there is the Executive order, which requires quantification, to the extent feasible, of all costs and benefits. That bears on the rules discussed earlier, as well as this one. Within the constraints of the law, there are principles that the new Executive order has in it, including public participation, engagement with relevant stakeholders, and open exchange of ideas, flexibility, meaning give people room to maneuver, because that tends to make economic sense; it also promotes freedom. That is in our Executive order.

So the law would be the first requirement; our Executive order would set the second level of details for analysis. Within the framework of the Executive order, probably the most important point here to emphasize is even when a rule is under review, before it is proposed for comment—and this hasn't been proposed for comment—people's concerns are very welcome in the form of meetings, as well as letters. So we have had a number of meeting requests on this one in which relevant information has been provided, and that definitely plays a role in the review process.

Chairman ISSA. I thank the gentleman.

We now go to the long-time businessman, job creator, and Congressman from Pennsylvania, Mr. Kelly.

Mr. KELLY. Thank you, Mr. Chairman, and thanks for the long-time job creator. It has been the family business for 57 years.

Professor, it is nice to have you with us again, and thank you so much for being here. One of the things that Dr. Graham talked about was that the bureaucrats at EPA and NTSA artificially inflated the benefits of their CAFE and greenhouse gas rulemakings for both light-duty and heavy-duty cars and trucks by declaring that society would declare a social benefit from tighter mileage standards and assigning it a savings of anywhere from \$21 to \$45 for each ton of carbon not admitted. Did the agencies present any type of science to back that up?

Mr. SUNSTEIN. Yes. That number is a result of a very lengthy report that reflected the views of the Council of Economic Advisors, the Department of Treasury, the Department of Energy, the Environmental Protection Agency, the Department of Transportation, the Department of Commerce, as well as the Office of Management and Budget; and any report that gets consensus from that diverse set of officials either would say nothing or be maybe pretty solid.

Mr. KELLY. Okay. So in that range, then, from \$21 to \$45 a ton, that is a pretty big range for all those people that weighed in on it.

Mr. SUNSTEIN. Yes. It actually is a somewhat larger range, where the \$21 is the central value, but at the low end it goes well below 21; at the high end it goes into the sixties.

Mr. KELLY. Earlier, one of our colleagues from Virginia was talking about had the American auto manufacturers not spun an end-run to get around the CAFE standards in the 1970's, they would not have faced some of the challenges they had. I was actually selling cars during that time period. CAFE standards really don't drive the market; the price of gasoline does. And I remember that very specifically, that whatever our standard was at that time wasn't really based on market conditions, it was, again, based on standards that somebody came up with that they thought would be bet-

ter than what we were currently doing with the concern for we were running out of this fuel. And I can remember Newsweek with the needle being on E and saying we are running out of this and we are running out of that, and a lot of that stuff, since then, we are finding out that we do have vast stores of oil, we do have an awful lot available to us.

But I am always perplexed, and you said, and I thought this was very good, you said we need to listen to the people who actually run these businesses, and I would agree with that. I am a guy that is a General Motors dealer. I am trying to understand the Chevy Volt. If it has such a great value and is such a significant part of our transportation strategy as we go forward, it should pretty much sell itself. And the fact that General Motors isn't putting a rebate on it, but the American taxpayers are putting \$7,500 into every Volt that is sold, and these are not being bought and snapped up by people who see, boy, this is a great car for me to own, this is something I am going to run out to the dealership and buy. I mean, we are being asked to take this car and stock it, which is a poor business practice. I usually don't like to have anything on my shelf that I can't turn in 45 or 60 days; it has kind of led into our family being able to survive for 60 years in the business. But I have people telling me, no, no, you have to stock this; you don't understand, this is the way the market is going.

And I am trying to understand because your comment, listen to the people who run these businesses, where in the world do we get a chance to do that?

Mr. SUNSTEIN. There are a couple of ways. One thing we are really trying to do is to spur this at our little office, which is when we have a rule under review, sometimes it will have been proposed formally to the public so people have a good sense of what it might look like. GIPSA is an example of that; that has been formally proposed. When it is out—

Mr. KELLY. If we could, I understand those, but when we are talking about transportation—and most of us, at some time in our life, actually go into a car dealership and sit down, pick out a car and negotiate the price and then buy it, so I am not getting into the silicons and everything else; I am talking about specifically who were the people who were involved in coming up with some of this great strategy as to what we should be driving in the future?

Mr. SUNSTEIN. With respect to fuel economy?

Mr. KELLY. With respect to the people who buy these. Because at some point we are legislating and we are regulating people out of the market. We are raising the prices of transportation, personal transportation so high that their only choice is to go to public transportation, finding another way to get from point A to point B, and we are going to drive them from their suburban settings back into the urban settings because they can't get there effectively; and that really does concern me, again, government picking and choosing the way we will choose our personal transportation.

Mr. SUNSTEIN. Okay. Well, before any rule that involves automobiles is finalized, and the one you are referring to is an example, it is presented to the public for comments, and if automobile companies or auto dealers have a problem with it, that plays—

Mr. KELLY. That is actually not true, and you know that is not true. No, it is the government decides what the CAFE is going to be, what the gas mileage is going to be, and then holds the car manufacturers hostage in order to meet these regulations. The cost of building these vehicles, by the way, is going to be so burdensome that private transportation as we know it is no longer going to be viable. We know that. No, the public does not weigh in on this. This is really, when you talk about overregulation and a government that wields its weight way too much, that is exactly what is happening in private transportation, and I would suggest that this country, which is built on private transportation, needs to take a look at what is happening.

Chairman ISSA. I thank the gentleman.

Mr. KELLY. And I thank you, sir. I yield back.

Chairman ISSA. Thank you.

We now go to another past job creator, the gentleman from Texas, Mr Farenthold.

Mr. FARENTHOLD. Thank you much, Mr. Chairman.

Mr. Sunstein, thank you for your hard work. You have taken on a very difficult task of weeding out some of these regulations. I think you are working with a scalpel. If you are not successful pretty soon, I think we are going to come in after you with a machete, because I think it is something that needs to be taken care of.

I want to start off by addressing something of particular interest to the State of Texas, and that is specifically the cross-State air pollution rule. This is a symptom that we are seeing in multiple occasions in Texas. We saw it with the dune sagebrush lizard, where Texas is not originally included in the original proposals and not given an opportunity to take part in the rulemaking process, and then as the final rule comes out or is about to come out, all of a sudden we are thrown in there. About a month ago, I think almost the entire Texas delegation sent you a letter with respect to these cross-State air pollution rules. Have you had a chance to read that letter and follow up on your offer maybe to help us out on that?

Mr. SUNSTEIN. Well, yes, definitely. That letter followed a discussion I had with almost the entire Texas delegation, both Democrats and Republicans, and subsequent to receiving that letter I have transmitted it to the Environmental Protection Agency, which I can assure you is thinking intensely about the issues that were raised.

Mr. FARENTHOLD. All right, let's just step back now and look at a broader perspective. You are seeing now agencies, more and more, going into these emergency rulemaking procedures, where the rules take effect immediately and end up being, in effect, permanently. Do you think we have maybe broadened the definition of what an emergency is beyond what the average American citizen would think is an emergency?

Mr. SUNSTEIN. You are taking me back to my days as an administrative law teacher. The Administrative Procedure Act allows agencies to dispense with notice and comment rulemaking when it is a unnecessary, impracticable, or contrary to the public interest. That is the statutory term. Sometimes that is referred in shorthand as an emergency exception, which I think is a useful way of re-



minding everyone, maybe particularly agencies, that the ordinary course is to go through notice and comment.

What I believe, and what OIRA is firmly committed to, and what the President, more importantly, has directed us as of January 18th to be firmly committed to is a 60-day notice and comment period unless there is some very unusual circumstance.

Mr. FARENTHOLD. And can you talk a little bit about sue and settle, where agencies are basically forced to implement rules as a result of a lawsuit from an activist group and basically sidestepping the normal procedure that way as well?

Mr. SUNSTEIN. Well, I think there are a couple of different situations that that rubric might capture. Let's describe the optimistic one first. The optimistic one is where the plaintiff, it could be a company that wants to avoid a burden, it could be an environmental group that wants to clean the air or the water, has a really good argument on the merits, let's suppose; and then the agency decides we are going to lose, why don't we enter into a settlement agreement, which will give us, in some cases, more flexibility and room to maneuver than could happen if the case went to trial. So that is completely legitimate. All I would say, as OIRA Administrator for that one, is that it should be clear that the public comment process and the legal requirements of the statute and the requirements of the Executive order, including careful cost-benefit analysis, choice of least burdensome alternative, etc., to the extent permitted by law, all have their appropriate play.

Mr. FARENTHOLD. I would love to sit down with you over coffee and have about 30 minutes to discuss that and the separation powers issues associated with it on a former lawyer to law professor level, but I only have about 30 seconds left, so I want to just pose one more thought for your consumption, as well as those that are watching.

Historically we have had scientists that are running these government agencies and in leadership posts, and I think now more than ever we are seeing political appointees, and very often political appointees from activist organizations, that are taking over leadership roles in executive branch regulatory agencies. Do you see that as a trend and/or as a problem?

Mr. SUNSTEIN. It is a great question, and I don't have enough kind of data about what the trends have been. What I would say is it is very clear, after my 2½ years at this office, is the scientific issues are often fundamental to regulatory decisions. And I agree with you, the scientific decisions have to be made by scientists, not by people who are political.

Mr. FARENTHOLD. Thank you very much. I see I am out of time.

Chairman ISSA. That is a rare sight you have.

Okay, well, I guess I will recognize myself for 5 minutes, and, if no one else returns, you are done. Bet you somebody else will show up, though; it just always happens. It is a busy day, and I appreciate your understanding of people going in and out.

I am going to just do some follow-up here. In the case of the GIPSA situation, one in which it wasn't \$100 million, now it is \$100 million, perhaps multibillion, in addition to, obviously, this economic review, would you commit to ensuring that there is a

public comment period opened, as there would have been had we realized that it was at least 10 times \$100 million initially?

Mr. SUNSTEIN. Because the Secretary of Agriculture has the statutory lead—

Chairman ISSA. What you mean is you have already been told no, so the answer is no?

Mr. SUNSTEIN. Definitely not. I would not say no to that, because the general proposition not only do I agree with, I think it is fundamentally important that, in general, the cost-benefit analysis has to be exposed to the public so that you can figure out whether the assessment might have something wrong in it.

Chairman ISSA. Don't make me buy something where I find out the price afterwards.

Mr. SUNSTEIN. Exactly. Exactly. So what I will commit to is engaging with the USDA on exactly that issue.

Chairman ISSA. I appreciate that, and I realize under the law that is the most we could ask for.

Would you agree to do essentially the same thing in the case of CAFE, where we sort of have the cart before the horse, and additional comment and process could be helpful?

Mr. SUNSTEIN. There is no question that before that rule is finalized, there needs to be a public comment process not only on the ultimate numbers, but on every ingredient of the number, as is standard.

Chairman ISSA. Okay. And as you might have heard, I know you heard earlier with Dr. Graham, concerns about the benefit analysis, particularly the weighting of electric cars as though they commit—you know, if you say there is no pollution when there is pollution, you are obviously distorting the cost-benefit consideration, so hopefully that would be something you would commit to do.

Would you say, from your position, that executive orders, per se, fall very far short of legislative action?

Mr. SUNSTEIN. In general, legislative action has more longevity than executive orders; that, I would say.

Chairman ISSA. Well, you know, the reason I ask you—Mr. Gowdy doesn't do traps; I enjoy doing this one—is my staff gave me this question because, in 2002, in the Law Review article you coauthored, it states that executive orders are not, per se; they are not sufficient for real change. That was a position that I think was accurate, that executive orders exist in the vacuum of something defined, and that something defined and put into statute in one procedure or another, rulemaking in some cases, and clearly legislation being normally the first, is the only thing that has longevity. Wouldn't you agree?

Mr. SUNSTEIN. Well, in general. It has turned out that the Reagan Executive order from the early 1980's, and I happened to be at the Justice Department at the time in the Reagan administration, the basic framework has lasted for decades, and my hope is, and my belief is that that this is now regulatory review in one or another form as a permanent part of our regulatory structure.

Chairman ISSA. Laws, like a declaration of war, are there until they are repealed. Executive orders, for example, the executive order that everyone said year after year was great, which is we won't assassinate a foreign head of state, it was only good until the

first time a secret executive order said go get him. So the executive order actually meant nothing, nothing at all year after year after year. I am a little concerned that if we don't come to that agreement, that an executive order is appropriate in order to guide the executive branch in the absence of guidance which is appropriate, but that ultimately if that guidance is intended to be acted on permanently, it should be codified in law as a regular matter of course.

And I will take, for example, the Mineral Management Service created by executive order under President Reagan—I think it is Reagan. Dysfunctional, hopeless organization, reviewed and always having problems, and part of the problem was that it really hadn't—it was put together conceptually and then never really dealt with after that; and, of course, President Obama made it very clear in the reorganization that that needed to be done now.

Mr. SUNSTEIN. I hear you, and the kind of statutory requirements that overlap with the executive order, including the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Regulatory Flexibility Act, those are all statutory, and we are strongly supportive of them.

Chairman ISSA. Okay. Well, I am going to take a break on the first round and go to the gentleman from Maryland for a second round first. Go ahead.

Mr. CUMMINGS. This is only going to take a second.

You know, one of the things that I am concerned about is how President Obama is portrayed, and I just listened to you talk about this whole look-back process. I hear my Republican colleagues beat up on President Obama, and it gets a little bit emotional for me, to be frank with you, because here is a President that is probably doing more than just about any other President in looking back. Am I right? Did Bush do this? Did President Bush do this?

Mr. SUNSTEIN. No one has done it in this system.

Mr. CUMMINGS. I mean like this.

Mr. SUNSTEIN. Right. Agreed.

Mr. CUMMINGS. So, you know, I think the President, in fairness to him, heard our colleagues and tried to create a balanced approach to trying to do this. And the reason why I bring this up is based upon the answers to the questions that you just gave to the chairman. He asked you about this rule; you said, okay, we are looking back. You talk about the screening part; we are doing that. And that is the balanced approach that makes sense. As a matter of fact, I think if it were done that way, there is not a person on this committee, I don't think, that would disagree with that, with the understanding that there are some things that become outdated. And you explained it quite well, why it is how you are able to find those kinds of rules that are outdated, that there are problems with, and that we need to get rid of.

All of us want to create jobs. God knows. I have, in my district, probably a 35 percent African-American male unemployment rate, black. I want to create jobs. I also want them to be in safe jobs.

Now, going back to the GIPSA rule, the letter that was admitted in the record a little bit earlier has a piece in here which I found very interesting, and I know the young lady who testified on this talked about there were a lot of organizations that were not related

to this whole agricultural situation, but the 15 that signed this, well, maybe about 14 that signed this letter, the Campaign for Contract Agriculture Reform, Center for Rural Affairs, Dakota Resource Council, anyway, go on and on, all of them are agriculture-related, the 14 that signed this letter.

But one of the things, the one that was admitted into the record. The question is they have a paragraph here that says, and this is why this is so interesting. This is part of the letter: "Prior to the proposed rule, USDA held numerous meetings with all parties with an interest in the proposed rule. After issuing the proposed rule, USDA took the step of extending the comment period 120 days, an extraordinary period of time for regulatory comment period."

"The comment period on the proposed rule closed on November 22, 2011. Over 60,000 comments were submitted on the proposed rule, including numerous detailed comments addressing the potential economic benefits and costs of the proposed rule. USDA also responded to the requests of livestock and poultry packers and processors to assign the USDA chief economist to oversee preparation of a comprehensive economic analysis of the GIPSA final rule. To date, USDA has taken almost 10 months in its review of the public comments. The regulatory process of the GIPSA proposed rule has been lengthy, thorough, open and even-handed."

And even with all of that, and I am not knocking you for doing it, I am glad you are doing a look-back, because I want it to be fair, even with all of that, you are still saying, we will take a look at it. And I am just going on the record to say that I think we ought to be fair to President Obama. At least he is trying to look back at something, I mean, this has already gone through the process.

The other problem that I see, and somebody talked about it a little bit earlier, and it kind of comes up in this, the rulemaking could take so long, and going back to what the chairman was saying, and I thought he made a very good point, is that sometimes by the time the rule comes up, it is outdated and it doesn't make any sense any more. So would you comment on that? I am not knocking the chairman or anyone. I just want a fair process.

Mr. SUNSTEIN. There are a lot of important points there. So it is true that sometimes the process of issuing rules is slower than it ought to be, including deregulatory rules. There is no question about that. And many people applauded our rule that eliminated milk producers from the oil spill rule, and thought, what took you so long.

So I completely agree with that. It would be good to think of ways to streamline not only rules, but processes for issuing rules when there is good reason to think that the rules would do some good. If we can work together on that, it would fit very well with our look-back process but also where there is an urgent public safety or health need, that would also be a good thing. We got a rule out that is presenting I think 79,000 illnesses from salmonella in eggs.

It also exempts, by the way, small farmers who aren't the source of the problem. So it is protective of small business as well as the American public. Many people thought that that rule, which has benefits well in excess of costs, took too long to get out, the protection was slower than it ought to have been.

Chairman ISSA. Thank you.

I will now recognize myself. We have spent a lot of time on GIPSA. Fortunately, you came very prepared, so that is helpful.

I am sure you are familiar that in the 2008 Farm Bill, in the discussion draft, now just remember, not to be partisan but to be descriptive, Republican President but a Democratic House and Senate, the language included in the discussion draft at the Senate Committee markup of the Farm Bill included the provision that would have allowed for what the rule is being proposed to do, which is not requiring a plaintiff in order to have a lawsuit.

So considered by the Democratic Senate at the time, rejected, law happens without it. On what basis, fundamental basis, does the branch of execution get to do something that was rejected by, or reasonably believed to be rejected by the body that created the law?

Mr. SUNSTEIN. Well, that would be hard to identify such a basis unless it is the case that the statutory text authorized the Secretary of Agriculture to do this. The earlier question suggested that this goes beyond congressional intent. If so, that is a very serious problem. If there is a delegation of authority to the Secretary to resolve this question, that would be the only possible answer.

Chairman ISSA. Let's go through something, because this is a unique opportunity, well, not unique, because you have been very generous to come here and come here again now, and we will ask you back again. But because of the regulatory process, and because quite frankly, C-SPAN and other groups sort of help us get out some constitutional questions, the founding fathers did not have regulatory language in the Constitution. They did not envision the executive branch passing laws. This is something that was created afterwards. And it didn't set limits.

So let's go through a process. In order to make a law currently, the House and the Senate have to pass bills that are identical through an initial process or through conference. They then have to send it to the President and have it either signed or if vetoed, they must override it with two-thirds of both houses. That is the law.

Once a law is in place, if the executive branch, and correct me if I am wrong at any point, the executive branch chooses to, quite frankly, extract out of pure air or thin cloth some ability to add another law, regulations are laws, rules are laws. The only way that that can be stopped is either through a very unusual court challenge, which is rare, because they defer to us to fix it, or a two-thirds majority of the House and the Senate telling the President he is wrong, effectively. We can do it through an ordinary majority, but then he can veto it.

So isn't that the current status of the balance between a rule chosen by the President or even an executive order, is that he can do anything he wants to do, he being the executive branch, that the Congress doesn't have a two-thirds majority to stop? Isn't that part of the balance that currently exists?

Mr. SUNSTEIN. I hope that that is more pessimistic than reality.

Chairman ISSA. And by the way I wasn't saying this happens regularly, or that there wasn't consultation. But ultimately, isn't that one of the realities, is that the check and balance of, we could have oversight, but to actually say, we don't approve of your rule,

we have to get majorities in the House and the Senate in order to do it and on top of that, in a timely fashion or we have to pass a new law, start to finish and strike it down?

Mr. SUNSTEIN. I would just add two points. One is that if a rule is proposed by an Executive agency, the general counsel's office at the department, call it the Department of Transportation, which has a superb general counsel, is carefully——

Chairman ISSA. Has a superb Cabinet officer, too.

Mr. SUNSTEIN. Yes, it does, absolutely. It is very much engaged on the question whether the rule conforms to congressional instructions. And so the first line of defense is the lawyers at the general counsel's office.

Chairman ISSA. But they are executive branch employees.

Mr. SUNSTEIN. Yes, though it happens time and again, I can say this from experience, that the general counsel's office or subsequent people engaged in the legal issue, will say, that is not what Congress meant, that is not consistent with the law.

Chairman ISSA. Well, let's go through the process. Congress recently acted, and we have acted previously, to set CAFE standards. We have in fact been the creators and the setter of CAFE standards, delegated to NHTSA. How did we get these CAFE standards this time? Didn't we get them around clear congressional intent, and isn't that part of why it is so controversial?

Mr. SUNSTEIN. Well, if you could imagine NHTSA doing some things that would be in plan violation of the underlying statute, and that would come out, the inconsistency with the underlying statute——

Chairman ISSA. But understand, the President said he did this without Congress. So it is very clear that the President did it without Congress. He did it without the process that has existed in the past.

Where, to your knowledge, was there an intent of Congress to have the executive branch from time to time raise those standards on their own?

Mr. SUNSTEIN. That would be the fuel economy statute, which as you said, delegates authority to the Department of Transportation. So it was without Congress in one respect, that is, that Congress didn't particularly select levels or mechanisms. But it was pursuant to a delegation of authority to the agency, which is a constrained delegation. And in fact, NHTSA has run into legal challenges for, not in this administration but in prior administrations, for not acting consistently with the legal constraints, or at least so was challenged.

So what is clear is that there couldn't be the creation of a CAFE standard just out of thin air.

Chairman ISSA. Well, yes, and my time is expired, so let me do this. I am going to yield to the gentleman from Pennsylvania and ask him if he would yield me back time. The gentleman is recognized.

Mr. KELLY. I will do that, sir.

Chairman ISSA. Quickly, under the Issa Act, conveniently similar to my name, we prohibited EPA from doing this, and yet they have done it. So we can have a lot of argument, the courts may ultimately have arguments. But isn't it clear that the President's ad-

ministration made a decision to do this, and they made a decision to do it without precedent, specifically based on actions that were created by Congress?

And I know you are not a constitutional, you are a very good scholar, you are not a constitutional scholar per se, but isn't this becoming a constitutional question? And that one of those in which the American people have to ask, do they trust this administration, the next administration? You didn't trust the last administration in some of your writings.

And shouldn't we ultimately seize back a great deal of this through some process that says, go ahead and make your rules, but ultimately, you have to get Congress buy-in in real time?

Mr. SUNSTEIN. What I would say is there are a couple of things that are built into our system that are responsive to your question. The first is, one of the President's core constitutional responsibilities is to take care that the laws be faithfully executed. So adherence to the law is at the heart of the Executive power under Article II.

It is also the case that Congress has mechanisms which have been used to express its——

Chairman ISSA. Do you mean exactly one time wherever it will shut down a rule?

Mr. SUNSTEIN. Well, I didn't just mean the Congressional Review Act. I also meant offering input and criticism of the direction in which any executive branch is going. And we have seen a couple of examples in the last hours. I can't emphasize strongly enough that if there is a rule that is under review at our office, or that the Department of Transportation, let's say, is devising, that seems to those who are responsible for the legislation to be inconsistent with it. That voice matters greatly.

Chairman ISSA. Let me ask you one last question, and I appreciate the continued indulgence of the gentleman, if we were to pass a law today that said, the President must on a quarterly basis bring us his package of regulations for a package vote up or down, essentially give us the right to vote as a package and if we didn't like it, we would vote the package down if it was sufficient, wouldn't that make those regulations truly bought-in by the American people? And wouldn't it make it inherently harder to pass a regulation?

And by the way, the same would be true of rolling back legislation. The gentleman very rightfully so said, concern about regulations going away. But isn't that the best way to have the confidence of the American people, potentially, rather than the arguments that have gone on here today?

Mr. SUNSTEIN. I don't know what would be the best way to have the confidence of the American people.

Chairman ISSA. Let's switch it to, wouldn't we pass less regs if in fact the President had to come to Congress with his package of regs to get codification rather than passing them as, if you will, *sua sponte*?

Mr. SUNSTEIN. There would be fewer regs and fewer deregs. Whether that diminution in number would pass the cost-benefit test, that is the question.

Chairman ISSA. And it is a good one. I yield back to the gentleman. Thank you.

Mr. KELLY. Thanks, Mr. Chair. And Professor, again, thanks for your indulgence. I know this can't be easy.

Going back to this CAFE, because I think it is important for the American people to understand, and my concern with all this is it doesn't matter what President's watch it happens on, whoever it is that is sitting in the chair either gets the praise or the blame. So really, it is truly a bipartisan criticism.

With CAFE, though, what has always bothered me, we are able as a government to eliminate consumer choice by coming up with these standards. If you could just help me on that. And I think I have a better understanding right now after the chairman's last line of questioning. But it is disturbing to me, because we really are eliminating, we are picking and choosing what people are allowed to drive and not drive or purchase and not purchase. The market really determines that.

And I would say that as far as gas knowledge is concerned, when the price of gasoline goes up, people go to smaller cars. It doesn't really have anything to do with CAFE. So if you could.

Mr. SUNSTEIN. The recent announcement by the President is the initiation of a process that will involve engagement with a number of the issues that have been raised today, including public notice and comment on issues, including consumer choice issues.

What I would emphasize with respect to CAFE standards is that there has been kind of bipartisan enthusiasm for assessment of costs and benefits. And at least the CAFE standards that have been issued in this administration have had benefits very far in excess of costs, really extraordinarily far in excess of costs. And have also allowed very great room for consumer choice. So it would be one thing to say, every car has to get 50 miles per gallon, it would be another thing to say that there is a fleet-wide average of X and the number of cars that are on the road can span an extraordinarily wide range.

And consistent with the Executive order which values flexibility and freedom of choice, I am with you that any CAFE structure should have a wide range of options, rather than be draconian.

So one question which really isn't for the OIRA Administrator to answer, it is for the people who are authorized by Article I of the constitution, you all, to answer, the question is whether the economic energy security and environmental benefits of a CAFE standard justify such restrictions as there are on the market. And there was a report, I believe in the early 2000's, from the National Academy of Sciences, very detailed report by a wide range of respected people, which ultimately concluded, was supportive of Congress's judgment, which is in favor of CAFE standards.

Mr. KELLY. Okay, thank you.

Mr. FARENTHOLD [presiding]. Thank you very much, and I will now recognize myself for 5 minutes. Again, I do want to thank you for coming up. I am sure it is never pleasant to testify before a congressional committee.

According to a recent Wall Street Journal article, the Obama administration considered but ultimately rejected a partial moratorium on new regulations. Is that correct?



Mr. SUNSTEIN. Well, the Wall Street Journal I believe said that. That is correct. [Laughter.]

Mr. FARENTHOLD. Were you involved in any discussions about that?

Mr. SUNSTEIN. What I am aware of is that in any domain that bears on economic policy, a wide range of questions come up. Any administration that is determined to help make things better, as ours is, would consider every question that a reasonable person might ask. It is true that a number of people on the outside have raised that question.

Mr. FARENTHOLD. I don't mean to try pin you down, are you aware of any of the issues that were considered in not implementing that moratorium?

Mr. SUNSTEIN. I can tell you a bit about why a moratorium is not coming, if that would be helpful. One problem which is closely related to the previous chairman's your immediate predecessor in that chair, the executive has to take care that the laws be faithfully executed. A moratorium would violate the requirement that the laws be faithfully executed. So it would have to be a highly qualified moratorium.

Second, a moratorium would sweep up deregulatory measures which we are pretty enthusiastic about expediting, because they are regulatory actions. And third, and this is an important point, a moratorium would not be a scalpel or a machete. It would be more like a nuclear bomb in the sense that it would prevent regulations that, let's say, cost very little and have very significant economic or public health benefits. So a moratorium would have the disadvantage of defying what every President since President Reagan has endorsed, which is cost-benefit analysis.

Mr. FARENTHOLD. We were talking a partial moratorium, and it seems this administration has not been, has not stopped itself from picking and choosing which laws it chooses to effect. We have seen the administration publicly say they are not going to enforce the Defense of Marriage Act, for example. So it is something they could do, if they chose to do.

Mr. SUNSTEIN. What I would say is, in the regulatory apparatus, to say we won't issue rules that Congress has required us to issue, that would violate the——

Mr. FARENTHOLD. I am not going to advocate either side, I just wanted to follow up on that article. In his opening statement, I don't believe you were here, but the opening statement for the first panel, Chairman Mica of the Transportation and Infrastructure Committee held up a chart with the amount and level of government regulations associated with building a highway. His numbers say it takes about 6 years to build a highway, basically saying, shovel-ready, basically saying does not exist in the amount of time.

I question how some of these regulatory agencies sleep at night, knowing as they delay these people who are not going back to work and not on a job. Do you have any solutions for this that we could, I realize you are working on it from your end. Do you have some things we could do on our end? We are costing ourselves money, tripling the price of highway projects and delaying people getting back to work.

Mr. SUNSTEIN. I agree completely that there is a problem with permitting requirements that at least in some important cases are having unfortunate delaying effects on desirable projects. I agree completely with that. If we have rules coming forward that add to that problem, they will have close scrutiny.

What I would suggest just as in this case, a consumer rather than an important actor, that engagement with the President's Jobs Council here would be very helpful. They are centrally concerned about this topic. Jeff Zientz, who is the Deputy Director at OMB, is centrally concerned with this problem. It would be very good, in this current economic situation, this opportunity, to improve the permitting process.

Mr. FARENTHOLD. As a Texan, Texas kind of prides itself on being a business friendly, as little regulation as possible State. One of the ways we were able to maintain that is all executive agencies in Texas face a sunset process and have to come back before the legislature to justify their existence. Do you see a benefit in adopting something like that on a Federal level?

Mr. SUNSTEIN. It may be too rigid. But I will tell you what I do see a benefit in that is closely analogous, is to take our look-back process not as a one-shot endeavor, but as a location for the creation of teams and institutions that are constantly, and not just because a President says so in a prominent document, but are constantly looking at rules to see if they should be eliminated. If you look at the plans, and we could certainly use your help on this, they say that this is a continuing endeavor. If members of the public see rules, including permitting-related rules, that are causing harm, or rules that are not consistent with how technologies now operate, or rules that were not a good idea at the beginning, but were not gotten rid of because the agency issued the rule and then declared victory and went on, there are teams now at the departments that are available to try to get that fixed.

It isn't quite a sunset provision, but it could serve many of the same functions.

Mr. FARENTHOLD. Thank you very much. Let me just ask you one more question, if you will indulge me. I get the sense that in some areas of the government, there is a, let's look for a solution to a problem that doesn't exist. It may be that there are people in jobs, say, I need to make my job relevant or some sort of mind set where, let's do something where there isn't a problem. It is probably too small potatoes to be on your plate.

We have an example in the district I represent in South Texas where the National Park Service wants to lower the speed limit on the Padre Island National Seashore from 25 to 15 miles an hour to protect the endangered Kemps Ridley sea turtle, when there has never been one incident on the Padre Island National Seashore of a turtle being hit by a car.

Do you have any thoughts on things we could do to maybe just change the mind set of, let's justify my job, let's have more regulations, let's make it harder to, if it ain't broke don't fix it kind of mentality?

Mr. SUNSTEIN. In the rulemaking area, we are very conscious of the need, as the President said the other night, to show that the rule is required. What served I think both Republican and Demo-

cratic administrations in good stead, in this domain, it is just a small part of the whole government, of course, is to require right off the bat a description of the market failure or other problem that justifies regulation. If you can't get over that threshold by saying, there is a market failure or other problem, then you probably should devote yourself to some other issue.

Mr. FARENTHOLD. I appreciate your taking the time to come and testify before this committee. I look forward to seeing you again. I would like to commend you on the job you are doing. It is a big one, and again, thank you very much for testifying.

Mr. SUNSTEIN. Thank you so much.

Mr. FARENTHOLD. And with that, we are done.

[Whereupon, at 1:05 p.m., the committee was adjourned.]

